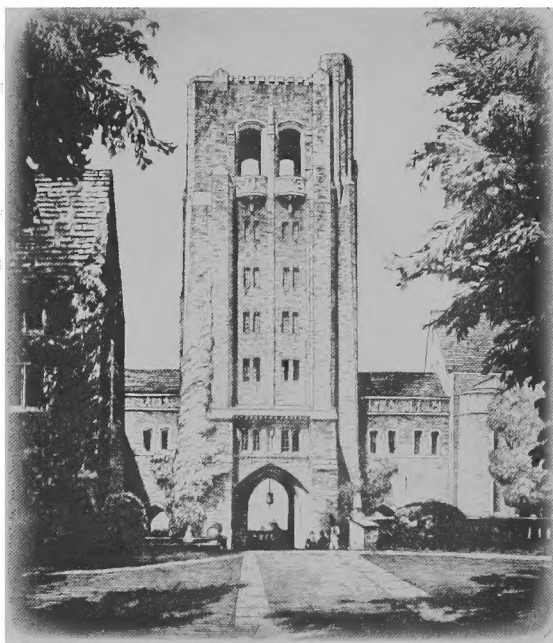


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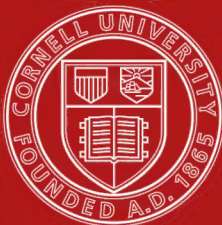
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A

SELECTION OF CASES

ON THE

LAW OF CONTRACTS

WITH A SUMMARY OF THE TOPICS COVERED
BY THE CASES

By C. C. ²LANGDELL

DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY

PREPARED FOR USE AS A TEXT-BOOK IN HARVARD
LAW SCHOOL

SECOND EDITION

BOSTON

LITTLE, BROWN, AND COMPANY

1879

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NOTE TO THE SECOND EDITION.

THIS edition contains several important cases which have been decided since the first edition was published. One section (II.) has also been added to the chapter on Consideration. To make room for these additions, some of the less important cases printed in the first edition have been omitted. The omissions have been chiefly in Section V. of the chapter on Consideration. The Summary of topics covered by the cases, printed at the end of the present edition, is entirely new. The object of it has been to develop fully all the important principles involved in the cases, and to that object its scope has been strictly limited. It has been no part of the writer's object, therefore, to make a collection of authorities upon the subjects discussed, and the citation of authorities has been almost wholly confined to the cases here collected.

CAMBRIDGE, October, 1879.

PREFACE TO THE FIRST EDITION.

I CANNOT better explain the design of this volume than by stating the circumstances which led me to undertake its preparation.

I entered upon the duties of my present position, a year and a half ago, with a settled conviction that law could only be taught or learned effectively by means of cases in some form. I had entertained such an opinion ever since I knew anything of the nature of law or of legal study; but it was chiefly through my experience as a learner that it was first formed, as well as subsequently strengthened and confirmed. Of teaching indeed, as a business, I was entirely without experience; nor had I given much consideration to that subject, except so far as proper methods of teaching are involved in proper methods of study.

Now, however, I was called upon to consider directly the subject of teaching, not theoretically, but practically, in connection with a large school, with its more or less complicated organization, its daily routine, and daily duties. I was expected to take a large class of pupils, meet them regularly from day to day, and give them systematic instruction in such branches of law as had been assigned to me. To accomplish this successfully, it was necessary, first, that the efforts of the pupils should go hand in hand with mine, that is, that they should study with direct reference to my instruction; secondly, that the study thus required of them should be of the kind from which they might reap the greatest and most lasting benefit; thirdly, that the instruction should be of such a character that the pupils might at least derive a greater advantage from attending it than from devoting the same time to private study. How could this threefold object be accomplished? Only one mode occurred to me which seemed to hold out any reasonable

prospect of success ; and that was, to make a series of cases, carefully selected from the books of reports, the subject alike of study and instruction. But here I was met by what seemed at first to be an insuperable practical difficulty, namely, the want of books ; for though it might be practicable, in case of private pupils having free access to a complete library, to refer them directly to the books of reports, such a course was quite out of the question with a large class, all of whom would want the same books at the same time. Nor would such a course be without great drawbacks and inconveniences, even in the case of a single pupil. As he would always have to go where the books were, and could only have access to them there during certain prescribed hours, it would be impossible for him to economize his time or work to the best advantage ; and he would be liable to be constantly haunted by the apprehension that he was spending time, labor, and money in studying cases which would be inaccessible to him in after life.

It was with a view to removing these obstacles, that I was first led to inquire into the feasibility of preparing and publishing such a selection of cases as would be adapted to my purpose as a teacher. The most important element in that inquiry was the great and rapidly increasing number of reported cases in every department of law. In view of this fact, was there any satisfactory principle upon which such a selection could be made ? It seemed to me that there was. Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer ; and hence to acquire that mastery should be the business of every earnest student of law. Each of these doctrines has arrived at its present state by slow degrees ; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases ; and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied. But the cases which are useful and necessary for this purpose at the present day bear an exceedingly small proportion to all that have been reported. The vast majority are useless, and worse than useless, for any purpose of systematic study. Moreover, the number of fundamental legal doctrines is much less than is commonly supposed ; the many differ-

ent guises in which the same doctrine is constantly making its appearance, and the great extent to which legal treatises are a repetition of each other, being the cause of much misapprehension. If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number. It seemed to me, therefore, to be possible to take such a branch of the law as Contracts, for example, and, without exceeding comparatively moderate limits, to select, classify, and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines; and that such a work could not fail to be of material service to all who desire to study that branch of law systematically and in its original sources.

It is upon this principle that the present volume has been prepared. It begins the subject of Contracts, and embraces the important topics of Mutual Consent, Consideration, and Conditional Contracts. Though complete in itself, it is my expectation that it will be followed by other volumes upon the same plan; but I have as yet formed no definite opinion as to how far the design will be carried. A volume upon Sales of Personal Property is more than half completed, and will be published within a few months.

C. C. LANGDELL.

CAMBRIDGE, Oct. 1, 1871.

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SELECTION OF CASES

ON THE

LAW OF CONTRACTS

PART I.

"It is ever good to rely upon the book at large, for many times *compendia sunt dispendia*, and *melius est petere fontes quam sectari rivulos*." — Co. Litt. 305 b.

"The advised and orderly reading over of the books at large, I absolutely determine to be the right way to enduring and perfect knowledge." — PREF. TO 4 REP

CASES ON CONTRACTS.

CHAPTER I.

MUTUAL CONSENT.

"Est autem pactio duorum pluriumve in idem placitum consensus."

ULPIAN, D. 2, 14, 1, 2

PAYNE v. CAVE. *Law*

IN THE KING'S BENCH, MAY 2, 1789.

[*Reported in 3 Term Reports, 148.*]

THIS was an action tried at the Sittings after last term at Guildhall before Lord Kenyon, wherein the declaration stated that the plaintiff, on 22d September, 1788, was possessed of a certain worm-tub, and a pewter worm in the same, which were then and there about to be sold by public auction by one S. M., the agent of the plaintiff in that behalf, the conditions of which sale were to be the usual conditions of sale of goods sold by auction, &c., of all which premises the defendant afterwards, to wit, &c., had notice; and thereupon the defendant, in consideration that the plaintiff, at the special instance and request of the defendant, did then and there undertake and promise to perform the conditions of the said sale to be performed by the plaintiff as seller, &c., undertook, and then and there promised the plaintiff to perform the conditions of the sale to be performed on the part of the buyer, &c. And the plaintiff avers that the conditions of sale hereinafter mentioned are usual conditions of sale of goods sold by auction, to wit, that the highest bidder should be the purchaser, and should deposit five shillings in the pound, and that if the lot purchased were not paid for and taken away in two days' time, it should be put up again and resold, &c. [stating all the conditions]. It then stated that the defendant became the purchaser of the lot in question for 40*l.* and was requested to pay the usual deposit, which he refused, &c. At the trial, the plaintiff's counsel opened the case thus: The goods were put up in one lot at an auction; there were several bidders, of whom the defendant was the last, who bid 40*l.*; the auctioneer dwelt on the bidding, on

which the defendant said, "Why do you dwell? you will not get more." The auctioneer said that he was informed the worm weighed at least 1300 cwt., and was worth more than 40*l.*; the defendant then asked him whether he would warrant it to weigh so much, and receiving an answer in the negative, he then declared that he would not take it, and refused to pay for it. It was resold on a subsequent day's sale for 30*l.* to the defendant, against whom the action was brought for the difference. Lord Kenyon, being of opinion, on this statement of the case, that the defendant was at liberty to withdraw his bidding any time before the hammer was knocked down, nonsuited the plaintiff.

Walton now moved to set aside the nonsuit, on the ground that the bidder was bound by the conditions of the sale to abide by his bidding, and could not retract. By the act of bidding he acceded to those conditions, one of which was, that the highest bidder should be the buyer. The hammer is suspended, not for the benefit of the bidder, or to give him an opportunity of repenting, but for the benefit of the seller; in the mean time, the person who bid last is a conditional purchaser, if nobody bids more. Otherwise, it is in the power of any person to injure the vendor, because all the former biddings are discharged by the last; and, as it happened in this very instance, the goods may thereby ultimately be sold for less than the person who was last outbid would have given for them. The case of *Simon v. Motivos*,¹ which was mentioned at the trial, does not apply. That turned on the Statute of Frauds.

THE COURT thought the nonsuit very proper. The auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding; that is signified on the part of the seller by knocking down the hammer, which was not done here till the defendant had retracted. An auction is not unaptly called *locus pœnitentiæ*. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. But according to what is now contended for, one party would be bound by the offer, and the other not, which can never be allowed.

Rule refused.

COOKE v. OXLEY. v

IN THE KING'S BENCH, MAY 14, 1790.

[Reported in 3 Term Reports, 653.]

THIS was an action upon the case; and the third count in the declaration, upon which the verdict was taken, stated that on, &c., a certain discourse was had, &c., concerning the buying of two hundred and

¹ 3 Burr. 1921.

sixty-six hogsheads of tobacco; and on that discourse the defendant proposed to the plaintiff that the former should sell and deliver to the latter the said two hundred and sixty-six hogsheads [at a certain price]; whereupon the plaintiff desired the defendant to give him (the plaintiff) time to agree to or dissent from the proposal till the hour of four in the afternoon of that day, to which the defendant agreed; and thereupon the defendant proposed to the plaintiff to sell and deliver the same upon the terms aforesaid, *if the plaintiff would agree to purchase them upon the terms aforesaid, and would give notice thereof to the defendant before the hour of four in the afternoon of that day*; the plaintiff averred that he did agree to purchase the same upon the terms aforesaid, and did give notice thereof to the defendant before the hour of four in the afternoon of that day; he also averred that he requested the defendant *to deliver* to him the said hogsheads, and offered to pay to the defendant the said price for the same, yet that the defendant did not, &c.

A rule having been obtained to show cause why the judgment should not be arrested, on the ground that there was no consideration for the defendant's promise,

Erskine and *Wood* now showed cause. This was a bargain and sale on condition; and though the plaintiff might have rescinded the contract before four o'clock, yet, not having done so, the condition was complied with, and both parties were bound by the agreement. The declaration considered this as a complete bargain and sale; for the breach of the agreement is for not *delivering* the tobacco, and not for not selling it.

LORD KENYON, Ch. J. (stopping Bearcroft, who was to have argued in support of the rule): Nothing can be clearer than that, at the time of entering into this contract the engagement was all on one side; the other party was not bound; it was therefore *nudum pactum*.

BULLER, J. It is impossible to support this declaration in any point of view. In order to sustain a promise, there must be either a damage to the plaintiff, or an advantage to the defendant: but here was neither when the contract was first made. Then, as to the subsequent time, the promise can only be supported on the ground of a new contract made at four o'clock; but there is no pretence for that. It has been argued that this must be taken to be a complete sale from the time when the condition was complied with; but it was not complied with, for it is not stated that the defendant did agree at four o'clock to the terms of the sale; or even that the goods were kept till that time.

GROSE, J. The agreement was not binding on the plaintiff before four o'clock; and it is not stated that the parties came to any subsequent agreement; there is, therefore, no consideration for the promise.

*Rule absolute.*¹

¹ This judgment was affirmed in the Exchequer Chamber; M. 32 G. 3.

ADAMS AND OTHERS v. LINDSELL AND ANOTHER.

IN THE KING'S BENCH, JUNE 5, 1818.

[Reported in 1 *Barnwall & Alderson*, 681.]

ACTION for non-delivery of wool according to agreement. At the trial at the last Lent Assizes for the county of Worcester, before Burrough, J., it appeared that the defendants, who were dealers in wool at St. Ives, in the county of Huntingdon, had, on Tuesday, the 2d of September, 1817, written the following letter to the plaintiffs, who were woollen manufacturers residing in Bromsgrove, *Worcestershire*: "We now offer you eight hundred tods of wether fleeces, of a good fair quality of our country wool, at 35s. 6d. per tod, to be delivered at Leicester, and to be paid for by two months' bill in two months, and to be weighed up by your agent within fourteen days, *receiving your answer in course of post.*"

This letter was misdirected by the defendants to Bromsgrove, *Leicestershire*, in consequence of which it was not received by the plaintiffs in *Worcestershire* till 7 P. M. on Friday, September 5th. On that evening the plaintiffs wrote an answer, agreeing to accept the wool on the terms proposed. The course of the post between St. Ives and Bromsgrove is through London, and consequently this answer was not received by the defendants till Tuesday, September 9th. On the Monday, September 8th, the defendants, not having, as they expected, received an answer on Sunday, September 7th (which, in case their letter had not been misdirected, would have been in the usual course of the post), sold the wool in question to another person. Under these circumstances, the learned Judge held that, the delay having been occasioned by the neglect of the defendants, the jury must take it that the answer did come back in due course of post; and that then the defendants were liable for the loss that had been sustained: and the plaintiffs accordingly recovered a verdict.

Jervis having in Easter Term obtained a rule *nisi* for a new trial, on the ground that there was no binding contract between the parties,

Dauncey, *Puller*, and *Richardson* showed cause. They contended that, at the moment of the acceptance of the offer of the defendants by the plaintiffs, the former became bound. And that was on Friday evening, when there had been no change of circumstances. They were then stopped by the Court, who called upon

Jervis and *Campbell* in support of the rule. They relied on *Payne v. Cave*, and more particularly on *Cooke v. Oxley*. In that case, *Oxley*, who had proposed to sell goods to *Cooke*, and given him a certain time, at his request, to determine whether he would buy them or not, was held not liable to the performance of the contract, even though *Cooke*, within the specified time, had determined to buy them, and

given Oxley notice to that effect. So here the defendants who have proposed by letter to sell this wool, are not to be held liable, even though it be now admitted that the answer did come back in due course of post. Till the plaintiffs' answer was actually received, there could be no binding contract between the parties; and before then the defendants had retracted their offer by selling the wool to other persons. But

THE COURT said, that if that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is completed by the acceptance of it by the latter. Then as to the delay in notifying the acceptance, that arises entirely from the mistake of the defendants, and it therefore must be taken as against them that the plaintiffs' answer was received in course of post.

Rule discharged.

ROUTLEDGE v. GRANT.†

IN THE COMMON PLEAS, MAY 13, 1828.

[*Reported in 4 Bingham, 653.*]

ASSUMPSIT. The declaration stated (first count) that the plaintiff was possessed of a term in a dwelling-house, to expire 25th December, 1856; and that defendant agreed, on the 29th April, 1825, upon receiving a lease for twenty-one years, at 250*l.* a year rent, with the option of having the time extended to thirty-one years on giving six months' notice, and upon having possession on the 25th July then next, to pay plaintiff 2,750*l.*, and take the fixtures at a valuation.

Averment of plaintiff's readiness to grant the lease. Breach; refusal to accept it, and to take the fixtures at a valuation; and non-payment of the 2,750*l.*

The second count alleged the plaintiff to be entitled to a certain term, to wit, a term of thirty-two years, in the dwelling-house, under a certain contract between the plaintiff and Anthony Hermon, who was authorized in that behalf; and then stated the agreement with the defendant, and the breach, as before.

The third count alleged plaintiff to be possessed for the residue of a certain term, to expire 25th December, 1856; and the agreement, tender of lease to defendant, and breach, as before.

At the trial before Best, C. J., London Sittings after Michaelmas

term, it appeared that on the 18th March, 1825, the plaintiff received a note from the defendant touching the premises in these terms :—

MR. GRANT'S PROPOSAL.

To pay a premium of 2,750*l.*, upon receiving a lease for twenty-one years, with the option (upon giving six months' previous notice to the landlord or his agent) of having the time extended to thirty-one years, paying the same yearly rent as before, for such extended term of ten years beyond twenty-one years. — Rent, 250*l.*

Mr. Grant to pay for the fixtures at a valuation, possession to be given on or before 25th July next, to which time all taxes and outgoings are to be discharged by Mr. Routledge; and a definitive answer to be given within six weeks from the 18th March, 1825.

The plaintiff, who at this time had only a term of twelve years in the premises, had to apply to his landlord for a new lease before he was in a condition to accept the defendant's offer. The plaintiff, having come to an understanding with his landlord, wrote the following note to the defendant :—

Mr. Routledge begs to say that he accepts Mr. Grant's offer for his house, No. 59 St. James's Street, and that he will give Mr. Grant possession on the 1st of August next.

St. James's Street, 6th April, 1825.

Mr. R. will esteem it a particular favor if Mr. Grant will not, for the present, name the subject to any one.

The defendant returned the following answer :—

7th April, 1825.

SIR,—I received your note last night, and hasten to acquaint you, that, having considered as confidential the negotiation respecting your house, I had mentioned it to no one; but upon consulting with a friend this morning, in whose opinion I have more confidence than my own, I am advised, for some reasons which had not occurred to myself, not to think of taking a house in St. James's Street for a dwelling-house. May I therefore request you to permit me to withdraw the proposal I made to you about it? I am in hopes you will make no hesitation to do this, when you consider the spirit of candor and openness in which it was made to you. But should it be otherwise, as I am the last that would willingly act with inconsistency, I will willingly refer the question to friends for decision, and abide by their opinion of the case.

I have the honor to be, &c.,

ALEX. GRANT.

MR. THOMAS ROUTLEDGE.

To this the plaintiff replied as follows :—

8th April, 1825.

SIR,—In answer to your letter of yesterday, I beg to state, that, relying upon your performing the agreement for the purchase of my house in St. James's Street, I have taken another house, and made arrangements which I cannot, without great loss, relinquish. I hope, therefore, that you will not wish me to withdraw it.

I am, &c.,

THOS. ROUTLEDGE.

ALEXANDER GRANT, Esquire.

The defendant rejoined : —

9th April, 1825.

SIR, — Your note of yesterday surprised me, being altogether at variance with your conversation with me two or three hours previous to your note, dated on the evening of 6th, in which, you must recollect, you one moment declared yourself off; and, finally, you went away to have the opinion of Mrs. Routledge about the answer you were to send me. How therefore you can, under such circumstances, suffer loss and inconvenience from my declining to proceed further in the treaty, I am at a loss to imagine; and I was in hopes you would have been satisfied with what I had stated in reply to your first note, to have had the liberality of letting the matter drop. But if that should not be your intention, I have only to add that you may proceed with your claim for "loss and inconvenience," as you may think most advisable.

I am, &c.,

ALEX. GRANT.

MR. THOMAS ROUTLEDGE.

The plaintiff, after this, surrendered the existing lease to his landlord, and obtained from him a new one, dated 21st April, 1825, from the 25th December, 1824, for thirty-two years, for the same clear yearly rent of 250*l.*, payable quarterly; in which the covenants on the part of the lessee were similar to those in the former; and then wrote the defendant the following letter : —

SIR, — Upon referring to my letter to you of the 6th inst., accepting your offer for my house, No. 59 St. James's Street, I perceive that I, by mistake, stated that I would give possession on the first day of August next. By your offer, you state that possession is to be given on or before the 25th July next; and I inform you that I am ready to give you possession, according to your proposal.

I am, &c.,

THOS. ROUTLEDGE.

29th April, 1825.

This letter, on the day it was dated, was delivered at the defendant's house; and the keys, and a lease of the premises in question, according to the agreement, were tendered to him before the 25th July, but rejected.

The six weeks, from the 18th March, 1825, within which, by the defendant's proposal, a definitive answer was to be given, expired on the 1st May, 1825.

Upon these facts it was objected, first, that the plaintiff being allowed six weeks to accept or reject the defendant's offer, the defendant was entitled also, until it was accepted, to retract it, at any period before the expiration of the six weeks; that there was no acceptance of the terms proposed till the 29th of April, which came too late, the defendant having retracted his proposal on the 9th. Secondly, that the plaintiff had not, before the defendant withdrew his proposal, any such interest in the premises as he was alleged to have in the declaration, or as would have enabled him to accede to that proposal. The plaintiff was thereupon nonsuited, with leave to move the Court to set the nonsuit aside.

Taddy, Serjt., accordingly obtained a rule *nisi* to set aside this nonsuit, and

Wilde, Serjt., showed cause. There was no valid contract binding on both parties. By the terms of the defendant's proposal, the plaintiff had six weeks to accept or reject it, and the parties would not have been on an equal footing if the defendant had not the privilege of withdrawing his proposal during the same period; having finally withdrawn it on the 9th of April, the plaintiff's acceptance on the 29th came too late, the acceptance on the 6th being out of the question, as not acceding to the terms offered by the defendant. *Kennedy v. Lee*,¹ has decided that an acceptance varying in any degree from the terms of an offer is, in effect, no acceptance; and *Adams v. Lindsell* confirms the principle established in *Cooke v. Oxley*, that a party who allows time for the acceptance of an offer may retract before it is accepted. But the plaintiff, at the time of the defendant's offer, and up to the period of his withdrawing it, had no such interest in the premises as that stated in the declaration, nor even such as could have enabled him to meet the proposal; he had only a term of twelve years when he agreed to grant thirty-one. On the ground of variance, therefore, the nonsuit cannot be impeached.

Taddy and Jones, Serjts., in support of the rule. The defendant's offer was made on good consideration; namely, that the plaintiff should procure him a term of thirty-one years in the premises: and a party cannot retract, during the time which he allows for deliberation, an offer made on good consideration. *Cooke v. Oxley* was determined on the ground that the bargain was *nudum pactum*, and therefore without consideration. Lord Kenyon said, "At the time of entering into the contract, the engagement was all on one side; the other party was not bound; it was, therefore, *nudum pactum*." And Buller, J., put it on the ground that it ought to have been stated that the defendant (who was allowed till four o'clock to consider whether or not he would buy goods on the terms offered) "did agree at four o'clock to the terms of the sale:" from which it may be inferred that, if such a statement had been made in the declaration and proved, the defendant would have been liable for refusing to perform his contract. In the present case there is a sufficient consideration, and a sufficient averment and proof of the plaintiff's agreeing to the terms of the contract before the expiration of the time limited. In *Adams v. Lindsell*, the defendants were held to be bound by an offer to sell upon receiving an answer in course of post, although, by accident, the answer did not arrive till two days after the next post, and the defendants had, in the mean time, sold the goods to a third person.

With respect to the alleged variance, — it is sufficient that the plaintiff had a term at his disposal; the time when it was to expire was immaterial, and the allegation that it was to expire in 1856 may be rejected as surplusage.² . . .

¹ 3 Meriv. 454.

² The learned counsel here stated the case of *Carvick v. Blagrove*, 1 Br. & Bing. 536, 4 B. Moore, 303. — ED.

It is sufficient if the party has, at the time of the completion of the contract, that which he proposes to sell. And on the 29th of April, before which time there was no complete contract in the present case, the plaintiff was in possession of the term he agreed to dispose of.

BEST, C. J. The nonsuit was right on both grounds. I put it on the same footing as I did at *Nisi Prius*. Here is a proposal by the defendant to take property on certain terms; namely, that he should be let into possession in July. In that proposal he gives the plaintiff six weeks to consider; but if six weeks are given on one side to accept an offer, the other has six weeks to put an end to it. One party cannot be bound without the other. This was expressly decided in *Cooke v. Oxley*, where the defendant proposed to sell, at a certain price, tobacco to the plaintiff, who desired to have till four in the afternoon of that day to agree to or dissent from the proposal; with which terms the defendant complied; and the plaintiff having afterwards sued him for non-delivery of the tobacco, Lord Kenyon put it on the true ground, by saying, "At the time of entering into this contract the engagement was all on one side; the other party was not bound." Buller, J., said, "It has been argued that this must be taken to be a complete sale from the time the condition was complied with: but it was not complied with; for it is not stated that the defendant did agree at four o'clock to the terms of the sale; or even that the goods were kept till that time." I put the present case on the same ground. At the time of entering into this contract the engagement was all on one side. In *Payne v. Cave* it was holden that the defendant, who had bid at an auction, might retract his bidding any time before the hammer was down; and the Court said, "The auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding; that is signified on the part of the seller by knocking down the hammer, which was not done here till the defendant had retracted. An auction is not unaptly called *locus pœnitentiæ*. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. But, according to what is now contended for, one party would be bound by the offer, and the other not, which can never be allowed."

These cases have established the principle on which I decide; namely, that, till both parties are agreed, either has a right to be off. The case of *Adams v. Lindsell* is supposed to break in on them; but I think it does not, because the Court put it on the circumstance that the offer was made by the post, and say, "If the defendants were not bound by their offer when accepted by the plaintiffs, till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is completed by the acceptance of it by the latter." If they are to be considered as making the offer till it is accepted, the

other may say, "make no further offer, because I shall not accept it;" and to place them on an equal footing, the party who offers should have the power of retracting as well as the other of rejecting; therefore I cannot bring myself to admit that a man is bound when he says, "I will sell you goods upon certain terms, receiving your answer in course of post." However, it is not necessary to touch that decision, for the reasoning of the Court coincides with the principle on which we now determine. As the defendant repudiated the contract on the 9th of April, before the expiration of the six weeks, he had a right to say that the plaintiff should not enforce it afterwards.

But upon the question of variance, we are all of opinion that none of the counts apply. It is not necessary, perhaps, that the termini of the plaintiff's lease should be set out with precision; but the variance is fatal if the plaintiff has not, at least, an interest which will enable him to perform his contract. The variance is not in words, but in substance. The plaintiff had no such term as that stated in the first and third counts. In the second, he states he had a contract for a lease;—such a contract, to be valid, must be in writing, and he cannot be said to have had it unless he had it in writing. But there was no evidence of any such contract; and, therefore, upon both grounds, the rule must be discharged.

BURROUGH, J., coincided in discharging the rule on the ground of variance.

GASELEE, J. If this case had rested on the first point, I should have wished for time to consider it; but on the ground of variance, I have no doubt that this rule must be

Discharged.

HEAD v. DIGGON.

IN THE KING'S BENCH, MICH. TERM, 1828.

[*Reported in 3 Manning & Ryland, 97.*]

ASSUMPSIT. The declaration stated, that plaintiff bargained for, and bought from defendant, certain large quantities of wool, to wit, at and for a certain rate or price, to wit, at or for the rate or price of 9*l.* 10*s.* for each and every pack thereof; and thereupon, in consideration of the premises and that plaintiff had undertaken to accept and pay for said wool at and for, &c., defendant undertook that he would, within a reasonable time, deliver said wool. Averment, that a reasonable time had elapsed, and that plaintiff had always been ready and willing to receive and pay; whereof defendant had notice: Yet defendant did not deliver within such reasonable time, or at any time. Whereby plaintiff lost great gains and profits. Second count, stating the consideration to be, that plaintiff *would buy*, receive and pay, and alleging a

promise to sell and deliver, and a readiness to buy, accept, and pay. Third count, laying the promise to deliver on request. At the trial before Holroyd, J., at the last Assizes for the county of Suffolk, the following facts appeared. The plaintiff is a wool-factor in Bury St. Edmund's, the defendant is a fellmonger at Thetford. On Thursday, the 17th of April, 1828, the plaintiff went to the defendant's house at Thetford to treat for the purchase of wool. After some discussion about the price, the plaintiff requested of the defendant time to consider of his terms. The defendant said he would give him a week. The plaintiff replied that three or four days would be enough. The defendant then wrote the following paper:—

THETFORD, April 17, 1828.

Offered Mr. Head, of Bury, the under wool, with three days' grace from the above date:—

40 Sussex head and lamb,	} £9 10s.
40 Head ditto,	
17 Broad head,	

As per sample; delivered in good condition.

FRAS. DIGGON.

On the following Monday the plaintiff went to the defendant to accept the wool, and to make arrangements for the delivery. The defendant said, that as the plaintiff had not seen him or written him on Sunday, he had given a price to one Fyson. The plaintiff said that Sunday was not a day of business. The defendant persisted in refusing to deliver the wool. Upon this evidence the learned Judge was of opinion that the plaintiff had failed in proving a contract binding on both parties, and on the authority of *Cooke v. Oxley* directed a non-suit, which

Storks, Serjt., now moved to set aside. It is true that, up to a certain period, one party was at liberty; but in *Adams v. Lindsell* the defendant offered to sell certain goods to the plaintiff, receiving an answer by return of post. The letter being misdirected, the answer, signifying the acceptance of the offer, arrived two days later than it ought to have done. The defendant had on the preceding day sold the goods to a third person. The Court held that this was a binding contract, and that an action lay for non-delivery of the goods. *Cooke v. Oxley*, upon which the other side relies, was cited in *Adams v. Lindsell*, and may be considered as overruled by the latter decision. [Lord Tenterden, C. J. Must both parties be bound, or is it sufficient if one only is bound? You contend that the buyer was to be free during the three days, and that the seller was to be bound. The declaration treats it as a complete contract, an absolute and unconditional bargain. Those counts are not proved. Whether a declaration could be framed to meet the facts, we are not called upon to decide.] The declaration applies to the contract at the period when, by the plaintiff's acceptance, it became complete.

LORD TENTERDEN, C. J. If the contract is to be taken as made only at the time when the plaintiff signified his acceptance of the offer, it is disproved by the circumstance that the defendant did not then agree.

BAYLEY, J. I am of the same opinion; and in *Routledge v. Grant* it was held by the Court of Common Pleas, that unless both parties are bound, neither is bound.

Rule refused.

MARY ANN WILLIAMS v. WILLIAM CARWARDINE.

IN THE KING'S BENCH, APRIL 18, 1833.

[*Reported in 4 Barnewall & Adolphus, 621.*]

ASSUMPSIT to recover 20*l.*, which the defendant promised to pay to any person who should give such information as might lead to the discovery of the murder of Walter Carwardine. Plea, general issue. At the trial before Park, J., at the last Spring Assizes for the county of Hereford, the following appeared to be the facts of the case: One Walter Carwardine, the brother of the defendant, was seen on the evening of the 24th of March, 1831, at a public house at Hereford, and was not heard of again till his body was found on the 12th of April in the river Wye, about two miles from the city. An inquest was held on the body on the 13th of April and the following days till the 19th; and it appearing that the plaintiff was at a house with the deceased on the night he was supposed to have been murdered, she was examined before the magistrates, but did not then give any information which led to the apprehension of the real offender. On the 25th of April the defendant caused a handbill to be published, stating that whoever would give such information as should lead to a discovery of the murder of Walter Carwardine, should, on conviction, receive a reward of 20*l.*; and any person concerned therein, or privy thereto (except the party who actually committed the offence), should be entitled to such reward, and every exertion used to procure a pardon; and it then added, that information was to be given, and application for the above reward was to be made, to William Carwardine, Holmer, near Hereford. Two persons were tried for the murder at the Summer Assizes, 1831, but acquitted. Soon after this, the plaintiff was severely beaten and bruised by one Williams; and on the 23d of August, 1831, believing she had not long to live, and to ease her conscience, she made a voluntary statement, containing information which led to the subsequent conviction of Williams. Upon this evidence it was contended, that as the plaintiff was not induced by the reward promised by the defendant to give evidence, the law would not imply a contract by the defendant to pay her the 20*l.* The learned Judge was of opinion, that the plaintiff, having given the information which led to the conviction of the

murderer, had performed the condition on which the 20*l.* was to become payable, and was therefore entitled to recover it; and he directed the jury to find a verdict for the plaintiff, but desired them to find specially whether she was induced to give the information by the offer of the promised reward. The jury found that she was not induced by the offer of the reward, but by other motives.

Curwood now moved for a new trial. There was no promise to pay the plaintiff the sum of 20*l.* That promise could only be enforced in favor of persons who should have been induced to make disclosures by the promise of reward. Here the jury have found that the plaintiff was induced by other motives to give the information. They have, therefore, negatived any contract on the part of the defendant with the plaintiff.

DENMAN, C. J. The plaintiff, by having given information which led to the conviction of the murderer of Walter Carwardine, has brought herself within the terms of the advertisement, and therefore is entitled to recover.

LITTLEDALE, J. The advertisement amounts to a general promise to give a sum of money to any person who shall give information which might lead to the discovery of the offender. The plaintiff gave that information.

PARKE, J. There was a contract with any person who performed the condition mentioned in the advertisement.

PATTESON, J. I am of the same opinion. We cannot go into the plaintiff's motives.

Rule refused.

HYDE v. WRENCH.

IN CHANCERY, DECEMBER 8, 1840.

[*Reported in 3 Beavan, 334.*]

THIS case came on upon general demurrer to a bill for specific performance, which stated to the effect following:—

The defendant, being desirous of disposing of an estate, offered, by his agent, to sell it to the plaintiff for 1,200*l.*, which the plaintiff, by his agent, declined; and on the 6th of June the defendant wrote to his agent as follows: “I have to notice the refusal of your friend to give me 1,200*l.* for my farm; I will only make one more offer, which I shall not alter from; that is, 1,000*l.* lodged in the bank until Michaelmas, when title shall be made clear of expenses, land tax, &c. I expect a reply by return, as I have another application.” This letter was forwarded to the plaintiff's agent, who immediately called on the defendant; and, previously to accepting the offer, offered to give the defendant

950*l.* for the purchase of the farm, but the defendant wished to have a few days to consider.

On the 11th of June, the defendant wrote to the plaintiff's agent as follows: "I have written to my tenant for an answer to certain inquiries, and, the instant I receive his reply, will communicate with you, and endeavor to conclude the prospective purchase of my farm. I assure you I am not treating with any other person about said purchase."

The defendant afterwards promised he would give an answer about accepting the 950*l.* for the purchase on the 26th of June; and on the 27th he wrote to the plaintiff's agent, stating he was sorry he could not feel disposed to accept his offer for his farm at Luddenham at present.

This letter being received on the 29th of June, the plaintiff's agent on that day wrote to the defendant as follows: "I beg to acknowledge the receipt of your letter of the 27th instant, informing me that you are not disposed to accept the sum of 950*l.* for your farm at Luddenham. This being the case, I at once agree to the terms on which you offered the farm; viz., 1,000*l.* through your tenant, Mr. Kent, by your letter of the 6th instant. I shall be obliged by your instructing your solicitor to communicate with me without delay, as to the title, for the reason which I mentioned to you."

The bill stated, that the defendant "returned a verbal answer to the last-mentioned letter, to the effect he would see his solicitor thereon;" and it charged that the defendant's offer for sale had not been withdrawn previous to its acceptance.

To this bill, filed by the alleged purchaser for a specific performance, the defendant filed a general demurrer.

Mr. *Kindersley* and Mr. *Keene*, in support of the demurrer. To constitute a valid agreement there must be a simple acceptance of the terms proposed. *Holland v. Eyre*.¹ The plaintiff, instead of accepting the alleged proposal for sale for 1,000*l.* on the 6th of June, rejected it, and made a counter proposal; this put an end to the defendant's offer, and left the proposal of the plaintiff alone under discussion; that has never been accepted, and the plaintiff could not, without the concurrence of the defendant, revive the defendant's original proposal.

Mr. *Pemberton* and Mr. *Freeling*, contra. So long as the offer of the defendant subsisted, it was competent to the plaintiff to accept it; the bill charges that the defendant's offer had not been withdrawn previous to its acceptance by the plaintiff; there therefore exists a valid subsisting contract. *Kennedy v. Lee*,² *Johnson v. King*,³ were cited.

*The MASTER of the ROLLS.*⁴

Under the circumstances stated in this bill, I think there exists no valid binding contract between the parties for the purchase of the property. The defendant offered to sell it for 1,000*l.*, and if that had been

¹ 2 Sim. & St. 194.

² 2 Bing. 270.

³ 3 Mer. 454.

⁴ Lord Langdale. — Ed.

at once unconditionally accepted, there would undoubtedly have been a perfect binding contract; instead of that, the plaintiff made an offer of his own to purchase the property for 950*l.*, and he thereby rejected the offer previously made by the defendant. I think that it was not afterwards competent for him to revive the proposal of the defendant, by tendering an acceptance of it;¹ and that therefore there exists no obligation of any sort between the parties; the demurrer must be allowed.

POTTER v. SANDERS.

IN CHANCERY, JULY 10, 11, AND NOV. 4, 5, 1846.

[*Reported in 6 Hare, 1.*]

G. S. SANDERS was seised in fee of three closes of land, in Byfield, in the county of Worcester, subject to a mortgage of 500*l.*, which he offered to sell at the price of 950*l.*, upon the condition that the purchaser should not require a covenant for the production of certain title deeds, which Sanders was unable to obtain. Potter, being informed of this offer, wrote to Sanders a letter, dated the 20th of April, 1844, offering 800*l.* for the land, taking the title as it stood. In reply to this letter, Sanders wrote to Potter as follows:—

BEWLEY MILL, REDDITCH, April 23, 1844.

SIR,—I received your favor this morning, and in reply beg to say that I accept of your offer of 800*l.* for the land at Byfield. I have written to Mr. Gery by this post, who shall let you know when the deeds are ready, which I believe will be in a few days. Will that be convenient to you?

Yours, &c.,

G. S. SANDERS.

This letter was put into the post-office on the day of its date. Sanders also wrote to Gery a letter of the same date, as follows:—

DEAR SIR,—I have written to Mr. Potter to say that he shall have the land at Byfield for 800*l.* I have told him that I have no doubt but that you will have the conveyance ready in a few days. Can you do so? As I am short of cash, would you ask him if he would pay me 100*l.* as a deposit, *instantly*? Perhaps it would not inconvenience him, and it would be of great service to me. You could give him a proper receipt, signed by me, and which would

¹ “An agreement may undoubtedly be constituted by letters; but if, in the course of the treaty, an offer made by letter is verbally rejected, the party who makes it is relieved from his liability on that offer, unless he consent to renew the treaty on the same footing; the party who has rejected the offer cannot afterwards, at his own option, convert the same offer into an agreement by acceptance; for that purpose he must have the renewed consent of the party who made the first offer.” Lord Langdale, M. R., in *The Sheffield Canal Company v. The Sheffield & Rotherham Railway Company*, 3 *Railway and Canal Cases*, 121.—ED.

make our bargain more firm. I suppose, as Mr. Potter intends to pay off the mortgage, it will be necessary for the mortgagees to sign the deed; and I have no doubt but that one of them will wish to be present at the settling, to receive the 500*l.* and interest. You need not tell Potter as from me, but hint to him, that if he does not complete the purchase without delay his chance will be gone.

Yours, &c.,

G. S. SANDERS.

While this correspondence was going on with Mr. Gery and Potter, Sanders was also in communication with another party, who was willing to purchase the land.

On the 8th of April, S. Gardner, as the agent of William Coates, applied to Sanders's father, who lived at Daventry, for the price of the land, and the father on the same day wrote to Sanders the following letter:—

DEAR GEORGE, — My principal reason for writing is to know the lowest price you will take for your land at Byfield. I have had a person to inquire after it to-day. He wishes for an answer immediately; so please to send me word directly on receipt of this.

Yours, &c.,

THOMAS SANDERS.

This communication was answered by a letter from Sanders to his father, dated the 12th of April, 1844, as follows:—

MY DEAR FATHER, — Unluckily I did not send for my letters yesterday, so did not have your kind note till this morning. I hope the delay will not be of consequence. My lowest price for the Byfield land is 925*l.*; and I will pay for the conveyance, which will take the 25*l.* I should think the timber on the land is worth 50*l.*, and that the purchaser would have into the bargain. I must admit I should be glad to sell it, and will leave it to you to dispose of it, if possible, should the parties offer even a less sum; although I think it ought not to go under the 925*l.* Mr. Gery would be employed to convey, as he has already in his possession a draft of the deed.

Yours, &c.,

G. S. SANDERS.

The father thereupon wrote the following letter, dated the 13th of April, 1844, to Gardner:—

I have heard from my son this morning. He is willing to take for his land 950*l.*, the timber included, or less, if the timber be valued. I shall be glad to hear from you as soon as convenient.

On the 23d of April, Sanders wrote to his father:—

MY DEAR FATHER, — Potter has written to offer me 800*l.* for the land at Byfield. Have you heard any thing from the party you wrote to me about? Perhaps if the party applying to you has no connection with Potter he would be induced to give more if he knew that I had received an offer from another party. I received Potter's letter this morning, and am now off to market, so have only time to say all are well.

In the morning of the 24th of April, 1844, an interview took place between Gardner and Sanders's father at the house of the latter, at

Daventry, at which the father, on behalf of Sanders, agreed (absolutely, as the witnesses deposed) to sell to Gardner, as the agent of Coates, the three closes of land for 900*l.*; and the timber upon it to be taken at a valuation. Sanders was informed of this contract by the following letter from his father:—

In reply to yours, received this morning, I have to say, that, if you approve of it, I have sold your land at Byfield for 900*l.*; the timber upon it to be taken at a fair valuation, and the purchaser to pay for the conveyance, and you for the title. The purchaser is acquainted with the title, and will pay for the land at Midsummer or Michaelmas next: which you think proper. I have promised to give an answer on Saturday next, if I can learn from you before that time. I hope you will be pleased with what I have done.

The transactions after the 24th of April, 1846, were these: By a letter dated the 24th of April, but bearing the post-mark of the 26th, Sanders stated to Potter that his father had sold the land before the letter to Potter of the 23d of April was written. Sanders, in reply, was informed by Mr. Gery, in a letter of the 28th of April, that Potter insisted upon his contract, and that he (Mr. Gery) thought there was no alternative for Sanders but to submit to perform it. Sanders, in a letter to Mr. Gery, of the 30th of April, acquiesced in this view, and reiterated his request for the immediate payment of 100*l.* in part of the purchase-money. Other communications passed with reference to the performance of the contract and preparation of the conveyance, and on the 7th of May, Potter paid Sanders 100*l.* in part of his purchase-money of 800*l.* On the other hand, Sanders, on the 26th of April, replied to his father's letter of the 24th of April, thus:—

MY DEAR FATHER,—I am much pleased with the bargain you have made for me. I should wish the purchase to be completed at Midsummer. As Aplin will have to make the conveyance, the title is sure to be correct. Who is the purchaser?

On the 27th of April, a memorandum of agreement was drawn up in writing, and signed by Sanders's father, as the agent of Sanders, and Gardner as the agent of Coates, in the terms of the contract already stated,—with the additional provision that, at Midsummer, the purchase was to be completed and possession given to the purchaser.

At the time of the foregoing transactions neither Coates, nor Gardner his agent, had any notice of the contract which Sanders had made with Potter; but Gardner received notice of that contract early in May, and on the 14th of the same month formal notice thereof was given to Coates; and Coates and Sanders were informed that Potter insisted upon his right to have the contract performed.

By indentures, dated the 31st of May and the first of June, 1844, Sanders and the mortgagees, by his appointment, conveyed the land to Coates, in consideration of the payment by the latter of the purchase-money mentioned in the memorandum of agreement of the 27th of April.

The bill was filed by Potter against Sanders and Coates; and it prayed that Sanders might be decreed specifically to perform his contract with Potter for sale of the land, and that Coates might be declared to be a trustee for Potter, and that Coates and Sanders might be decreed to convey the premises to Potter; or if it should appear that Coates had no notice of the contract with Potter before the conveyance, then that an account might be taken of what was due to Potter from Sanders for principal and interest on the 100l., and that Sanders might be ordered to pay the same and the costs of the suit to Potter.

Gardner, who was the agent of Coates, stated in his evidence, that on the 17th of April, 1844, he made an offer for the land to Sanders's father, who promised him the refusal for a week, and that he completed the contract on the 24th of April, on which day the week would expire.

At the hearing,

Mr. *Walker* and Mr. *Stinton*, for the plaintiff, cited *Daniels v. Davison*,¹ *Farmer v. Robinson*.²

Mr. *Beals*, for the defendant Sanders.

Mr. *Romilly* and Mr. *Fleming*, for the defendant Coates. There is a question whether the contract with Coates was not the prior contract; but the least favorable way of stating his case is to say that the equities are equal; and Coates having the legal estate, the Court will not interfere to dispossess him of it. The bill seeks the specific performance of a contract to which Coates is no party. This is contrary to the course of the Court. Why is Coates to be involved in a suit concerning a transaction with which he had nothing to do? *Tasker v. Small*,³ *Mole v. Smith*,⁴ *Robertson v. The Great Western Railway Company*,⁵ *Wood v. White*,⁶ *Mason v. Franklin*.⁷ To sustain a suit for specific performance there must be mutuality; but here it is clear that Sanders could not maintain such a suit against Potter. How, then, can Potter sustain the suit against Sanders? and if he has not the right against Sanders he has not the right against Coates. Suppose a case in which a vendor had fraudulently contracted to sell the same estate to three different persons successively, and conveyed the estate to the third purchaser. The two first purchasers have their legal remedies upon their several contracts, but neither of them can call upon the third purchaser to transfer to him the legal estate. Suppose, again, a contract with one party who pays his purchase-money, but does not obtain a conveyance, and a second contract fraudulently made with another purchaser, who at the time of his contract has no notice of the first contract, and afterwards acquires the legal estate. The right of the first purchaser is not to a conveyance of the estate to himself as a purchaser, but only to stand as a mortgagee of the estate for the amount of his purchase-money. 5 Bythewood, by Jarman, 3d ed. p. 445, *Allen v. Anthony*,⁸

¹ 16 Ves. 249; s. c., 17 Ves. 433.

³ 3 Myl. & Cr. 63.

⁶ 4 Myl. & Cr. 460.

⁴ Jac. 490.

⁷ 1 Y. & C. C. C. 239.

² 2 Campb. 339, n.

⁵ 10 Sim. 314.

⁸ 1 Mer. 282.

Dawson v. Ellis.¹ The circumstance that the contract with Coates was parol only is not material; for a parol contract is a good defence in equity, although a decree for specific performance could not be made upon it. *Hyde v. Wrench*. Here was a clear authority to the father to sell the estate, and a contract for sale made under that authority. The Court will not deprive Coates of the legal interest which he has acquired in pursuance of that contract. *Parken v. Whitby*,² was also cited, on the effect to be given to Gardner's deposition.

VICE-CHANCELLOR :³—After stating the facts which took place before and on the 24th of April, and the subsequent conveyance to Coates,—

The above facts are, I believe, sufficient to raise the question at issue between the parties; for I lay out of the case the argument at the bar founded upon the facts deposed to by Gardner, but not suggested in the pleadings, that the defendant's contract of the 24th of April is to be referred to the 17th of April. The answer is most explicit, that the defendant's contract was on the 24th, and upon that issue is joined. Neither the payment of the 100*l.*, which was made after notice of the defendant's agreement, nor the correspondence and communications which took place between the different parties after the 23d of April, appear to me to affect the question in the cause, except as they clearly show upon whom the costs of this suit ought to fall. On the 27th of April, 1844, the plaintiff received a letter from defendant Sanders, dated the 24th of April, but having the post-office mark of the 26th,—and which cannot by any possibility be correctly dated, in which he says,—not very candidly,—that when his letter of the 23d was written, his father had made the contract with Coates. Sanders was soon afterwards informed by a letter from Mr. Gery, that the plaintiff insisted upon the performance of the contract; and from that time he apparently considered the plaintiff entitled to the benefit of his contract. He desired Gery to proceed with the conveyance, suggested that a formal agreement in writing be prepared to make the matter safe; and on the 7th of May received from the plaintiff 100*l.* on account of his purchase. However, on or soon after the 14th of May, his views were altered, and he appears then to have considered the defendant Coates entitled to a performance of the contract entered into on his behalf. None of these matters, however fertile they may have been as topics for observation upon conduct, appear to me to affect the dry legal questions to which I am bound to confine myself.

The first question is, whether the plaintiff's contract has not priority, in point of time, over the verbal contract made with Coates on the 24th of April. If that question be answered in the affirmative, it will dispose of the whole case. For the property comprised in the contract would cease to belong to the vendor from the moment that contract was concluded; and I am quite clear (in the circumstances which I have detailed) that Coates can derive no advantage from the convey-

¹ 1 J. & W. 524.

² Turn. & Russ. 366.

³ Sir James Wigram. — Ed.

ance of the legal estate, taken after notice of the plaintiff's agreement for purchase, and whilst his own position was unaltered by payment of purchase-money or otherwise, under an agreement which, if the plaintiff's contract had priority, would be void from the beginning.

For the purpose of answering the question, whether the plaintiff's contract had priority, I was at one moment inclined to direct an inquiry (the answer to which I felt certain I might anticipate), at what hour of the 24th of April the letter of the 23d was delivered at the plaintiff's residence in the regular course of post. I cannot doubt that it would be delivered before the verbal contract with Coates was made; and, if so, that would decide the case. But, upon further consideration, I think it unnecessary to direct that inquiry. The delivery of the letter on the 24th was merely the completion of an act by which the vendor had bound himself on the 23d. If the vendor had died on the 23d, after posting the letter of that date, I can scarcely entertain a doubt but that the plaintiff would in this court have been the owner of the estate, as against the heir of the vendor. But without carrying the point further, I think the vendor, when he put into the post-office the letter to the plaintiff of the 23d of April, did an act which, unless it was interrupted in its progress, concluded the contract between himself and the plaintiff. I cannot, in short, doubt but that the letter of the 23d was a revocation of the authority which the vendor had given to his father, to make a contract for him for the sale of the estate. Independently, therefore, of the consideration, that the contract with Coates of the 24th of April was a verbal contract only, I think the plaintiff is entitled to a decree.

In the preceding observations I have assumed that the agreement made with Coates on the 24th was absolute in the first instance. But from the contemporaneous letter of Sanders, the father, it may be doubted whether the agreement was not conditional; and if that were so, there can be no doubt that Sanders's letter, of the 23d of April, to the plaintiff, was received before Sanders could have assumed to confirm the agreement made by his father.

Mr. *Romilly* asked that the decree might provide for the payment by Sanders of the costs of Coates.

The *Vice-Chancellor* said that Coates was aware of the facts of the case when he took his conveyance. If Sanders had covenanted to indemnify Coates, he did not require the assistance of this Court to obtain his costs. If he had not such an express covenant, the Court would not imply one.

Decree for specific performance of the plaintiff's contract. All necessary parties to convey. Account of the purchase-money remaining due, and of the rents and profits. Costs against both defendants; but, if any part of such costs shall be recovered against Coates, Coates to be at liberty, in the name of the plaintiff, to recover such costs over against Sanders, Coates undertaking to indemnify the plaintiff in respect of the costs of such proceedings as he may take for that purpose.

DUNLOP v. HIGGINS.

IN THE HOUSE OF LORDS, FEBRUARY 21, 22, 24, 1848.

DUNLOP AND OTHERS, *Appellants*.VINCENT HIGGINS AND OTHERS, *Respondents*.

[Reported in 1 House of Lords Cases, 381.]

'THIS was an appeal against a decree of the Court of Session, made under the following circumstances: Messrs. Dunlop & Co. were iron masters in Glasgow, and Messrs. Higgins & Co. were iron merchants in Liverpool. Messrs. Higgins had written to Messrs. Dunlop respecting the price of iron, and received the following answer: "Glasgow, 22d January, 1845. We shall be glad to supply you with 2000 tons, pigs, at 65 shillings per ton, net, delivered here." Messrs. Higgins wrote the following reply: "Liverpool, 25th January, 1845. You say 65s. net, for 2000 tons pigs. Does this mean for our usual four-months' bill? Please give us this information in course of post, as we have to decide with other parties on Wednesday next." On the 28th Messrs. Dunlop wrote, "Our quotation meant 65s. net, and not a four-months' bill." This letter was received by Messrs. Higgins on the 30th of January, and on the same day, and by post, but not by the first post of that day, they despatched an answer in these terms: "We will take the 2000 tons pigs you offer us. Your letter crossed ours of yesterday, but we shall be glad to have your answer respecting the additional 1000 tons. In your first letter you omitted to state any terms; hence the delay." This letter was dated "31st January." It was not delivered in Glasgow until 2 o'clock p. m. on the 1st of February, and, on the same day, Messrs. Dunlop sent the following reply: "Glasgow, 1st February, 1845. We have your letter of *yesterday*, but are sorry that we cannot now enter the 2000 tons pig-iron, our offer of the 28th not having been accepted in course." Messrs. Higgins wrote on the 2d February to say that they had erroneously dated their letter on the 31st January, that it was really written and posted on the 30th, in proof of which they referred to the post-mark. They did not, however, explain the delay which had taken place in its delivery. The iron was not furnished to them, and iron having risen very rapidly in the market, the question whether there had been a complete contract between these parties was brought before a court of law. Messrs. Higgins instituted a suit in the Court of Session for damages, as for breach of contract. The defence of Messrs. Dunlop was, that their letter of the 28th, offering the contract, not having been answered in due time, there had been no such acceptance as would convert that offer into a lawful and binding contract; that their letter having been delivered at Liverpool before eight o'clock in the morning of the 30th

of January, Messrs. Higgins ought, according to the usual practice of merchants, to have answered it by the first post, which left Liverpool at three o'clock P. M. on that day. A letter so despatched would be due in Glasgow at two o'clock P. M. on the 31st of January; another post left Liverpool for Glasgow every day at one o'clock A. M., and letters to be despatched by that post must be put into the office during the preceding evening, and if any letter had been sent by that post on the morning of the 31st, it must have been delivered in Glasgow in the regular course of post at eight o'clock in the morning of the 1st of February. As no communication from Messrs. Higgins arrived by either of these posts, Messrs. Dunlop contended that they were entitled to treat their offer as not accepted, and that they were not bound to wait until the third post delivered in Glasgow at two o'clock P. M. of Saturday, the 1st of February (at which time Messrs. Higgins' letter did actually arrive), before they entered into other contracts, the taking of which would disable them from performing the contract they had offered to Messrs. Higgins.

The cause came before Lord Ivory, as Lord Ordinary, who directed an issue, which he settled in the following terms:—

“Whether, about the end of January, 1845, Messrs. Higgins purchased from Messrs. Dunlop 2,000 tons of pig-iron, at the price of 65s. per ton, and whether Messrs. Dunlop wrongfully failed to deliver the same, to the damage, loss, and injury of the pursuers? Damages laid at 6,000*l*.” This issue was tried before the Lord Justice General, when it appeared that the letter of Messrs. Higgins, accepting the offer, was written on the 30th; that it was posted a short time after the closing of the bags for the despatch at three o'clock P. M. on that day, and consequently did not leave Liverpool till the despatch at one o'clock in the morning of the 31st; that, in consequence of the slippery state of the roads, the bag then sent did not arrive at Warrington till after the departure of the down train that ought to have conveyed it, and that this circumstance occasioned it to be delayed beyond the ordinary hour of delivery. The Lord Justice General told the jury “that he adopted the law as duly expounded in the case of *Adams v. Lindsell*, and which is as follows: ‘A., by a letter, offers to sell to B. certain specified goods, *receiving an answer by return of post*; the letter being misdirected, the answer notifying the acceptance of the offer arrived two days later than it ought to have done; on the day following that when it would have arrived, if the original letter had been properly directed, A. sold the goods to a third person,’ and in which it was held ‘that there was a contract binding the parties from the moment the offer was accepted, and that B. was entitled to recover against A. in an action for not completing his contract.’”

The counsel for Messrs. Dunlop tendered the following exceptions: The first exception related to evidence, and alleged “that no evidence to show that the letter, purporting to be dated on the 31st, was really written on the 30th of January, ought to have been admitted.” The other exceptions related to the charge, and were as follows:—

2. In so far as his Lordship directed the jury, in point of law, that if Messrs. Higgins posted their acceptance of the offer in due time according to the usage of trade, they are not responsible for any casualties in the post-office establishment.

3. In so far as his Lordship did not direct the jury, in point of law, that, if a merchant makes an offer to a party at a distance by post-letter, requiring to be answered within a certain time, and no answer arrives within such time as it should arrive, if the party had written and posted his letter within the time allowed, the offerer is free, though the answer may have been actually written and posted in due time, if he is not proved to be aware of accidental circumstances preventing the due arrival of the answer.

4. In so far as his Lordship did not direct the jury, in point of law, that, in the case above supposed, if an answer arrives, bearing a date beyond the time limited as above for making answer, and arrives by a mail, and is delivered at a time corresponding to such date, the offerer is entitled to consider himself free to deal with the goods as his own, either to sell or to hold, if he be not in the knowledge that the answer received was truly written of an earlier date, and delayed in its arrival by accident.

5. In so far as his Lordship did not direct the jury, in point of law, that, in case of failure to deliver goods sold at a stipulated price, and immediately deliverable, the true measure of damage is the difference between the stipulated price and the market price, on or about the day the contract is broken, or at or about the time when the purchaser might have supplied himself.

These exceptions were afterwards argued before the judges of the First Division, who pronounced an interlocutor, disallowing the exceptions; and that interlocutor was the subject of the present appeal.

Mr. *Bethell* and Mr. *Anderson*, for the appellants.

The question raised in this case is one of considerable importance, and the decision of it in accordance with the judgment of the court below will have the effect of rendering the acceptance of contracts a matter of doubt and uncertainty. If the decision of the judges of the Court of Session is right, a contract is complete when the acceptance of the offer to enter into it is posted, although such acceptance may not reach the person who made the offer till long after the time at which, by the usage of trade, he is entitled to expect it. Such a decision, if unreversed, will leave the person making an offer under the necessity of waiting for an indefinite time in order to know whether his offer has been accepted. During all this time he will be restrained from freely dealing with his own property.

The exceptions here ought to have been sustained by the Court. The first of them relates to the evidence offered at the trial. That evidence was improperly admitted. The Court ought not to have received evidence to contradict a written document. When a letter is sent to a party, he has a right to assume that it is properly written, and is

entitled to rely on its contents. He is at least entitled to do so as against the writer of the letter. The writer is not at liberty to show those contents to be erroneous: at all events he is not at liberty to do so after the person receiving it has acted upon it, and thus to affect the rights of that party, and to give himself rights to which, if the letter had been correctly written, he would not have been entitled. To admit such evidence is to unsettle all the rules of business, and to prevent commercial men acting with that certainty and confidence which are necessary for the proper conduct of commercial affairs.

[THE LORD CHANCELLOR. When a party sends a letter, actually sent on the 30th, but dated by mistake on the 31st, may he not show that that date has been put in by mistake?]

It might be difficult to maintain the simple negative of that question, but in considering the admissibility of such evidence, all the circumstances of the case must be referred to. In the present case, for instance, as the letter was received on a day after that of its date, and when, therefore, the person receiving it had no reason to suspect that the date was erroneously given, his rights ought not to be affected by a subsequent explanation; and the evidence intended to afford that explanation ought not therefore to have been admitted.

Then as to the second exception: if a letter sent is posted in due time, but is not received in due time, who is to bear the loss consequent upon its non-delivery? Certainly not the person to whom it is sent. The fact that it is sent by the post-office makes no difference in the matter. It is the same as if the letter was sent by a special messenger, in which case it is plain that the person sending the messenger would be responsible for any accident or delay. The appellants are not to be made responsible for the casualties of the post-office, and surely they cannot be made so in a case in which the persons sending an answer to an offer which they had made, totally disregarded the ordinary usages of commercial houses as to the time of sending such answer.

The clear principle, set forth in the third exception, is that which ought to be adopted in all cases of this kind. Where an individual makes an offer by post, stipulating for, or, by the nature of the business, having the right to expect, an answer by return of post, the offer can only endure for a limited time, and the making of it is accompanied by an implied stipulation that the answer shall be sent by return of post. If that implied stipulation is not satisfied, the person making the offer is released from it. When a person seeks to acquire a right, he is bound to act with a degree of strictness, such as may not be required where he is only endeavoring to excuse himself from a liability. The question of reasonableness of notice, which may be admitted in cases of bills of exchange, cannot be introduced in a case where one party seeks to enforce on another the acceptance of a contract. A bill of exchange is already a binding contract; no new right is acquired by notice; it is merely a necessary proceeding to enable the party giving it to enforce a right previously created.

Then as to the [fourth?] exception. In the case of a contract, the acceptance of the offer creates the contract; the acceptance implies that both parties have knowledge of all the circumstances. On principle, it is plain that the acceptance should be immediate, and that if there is a delay in making that acceptance known, the offerer is free. In order to make the contract perfect, there ought to have been a co-existing assent. *Countess of Dunmore v. Alexander*. There, a lady having written to another to engage a servant for her, and then sent a second letter to countermand the first, and the two letters having been delivered to the servant simultaneously, it was held that there was not a complete contract, and that the servant was not entitled to wages. The Court of King's Bench, in *Head v. Diggon*, acted upon the same principle. There, A. and B. being together, B. offered goods to A. at a certain price, and gave A. three days to make up his mind. The Court held that this was not an absolute bargain, and that within the three days B. had a right to retract.

Such are the principles which ought to govern this case. Then as to authority. It is curious enough that this exact question seems never to have arisen. That circumstance is some proof of the clearness of the principle which is applicable to such transactions, for had there been any question as to that principle, — had it been doubtful whether delay might be excused, and whether, in spite of delay, a party guilty of it might not still insist on a contract being complete, cases must have arisen as to the degree of laxity permitted by the law in the acceptance of contracts. None such is to be found. The case of *Adams v. Lindsell* was the authority adopted by the Lord Justice General in his direction to the jury: but that case does not justify his ruling. [THE LORD CHANCELLOR. If the letter of acceptance is sent in the usual way, is the sender still responsible for its due delivery?] If not, then both parties are free. One cannot be bound while the other is free. Each party takes an equal risk. But supposing delay is to be permitted, to what extent is it to be allowed? May the delay last one, two, or three days, or a week, or a fortnight, or a month? If any delay is to be permitted, the extent of it must be defined. Otherwise, all commercial matters will be in a state of perpetual uncertainty. But, in fact, no delay is allowed. Each party is bound to write by return of post, and each is liable to the consequences of his own letter [not?] arriving in time. Such appears to be the mercantile usage on the subject. When an offer is made by one merchant to send to another a particular commodity which varies in price, that offer is made subject to the obligation of its being answered by return of post. It is therefore an offer subject to a condition. It is conditional, in point both of time and manner of acceptance. As to time, the offer enures till it can be answered by return of post. If it is made on a condition, then it is clearly not binding till that condition shall be accepted. Here, too, the condition is a condition precedent. Nothing, therefore, can be substituted for it.

[THE LORD CHANCELLOR. Where is this condition imposed?]

In mercantile usage, founded on law. The legal condition is to return an answer in a particular time. Mercantile usage has fixed that time as the return of post. No decision has ruled, as a point of legal principle, that, if an individual addressed fails in performing this condition, still that the person making the offer is bound. The principle of the Scotch law, as stated in M'Douall's Institutes, is the other way. It is there said,¹ "Conditional obligations, properly so termed, are presently binding and irrevocable, and only the effect is suspended, but sometimes the obligation is only to be contracted upon a condition which affects the very substance of it. Thus an offer has an implied condition of acceptance, whereby alone the consent of the other party accedes and converts the offer into a contract; so that it is not binding, but ambulatory or revocable, till it is accepted, and therefore either revocation by the offerer, or death of either party before acceptance, voids it. The same rule holds in mutual contracts, — the one party subscribing is not bound till the other subscribe likewise." The law of England is in conformity with the principle of the Scotch law.

As the revocation by either party before acceptance makes the offer void, the acceptance of the other side must be notified within a definite period of time; Stair's Institutes.² This rule of notification is a condition precedent in the English as well as the Scotch law. This principle was acted on by the Court of King's Bench in the case of *Davison v. Mure*.³ That was the case of a ship which was captured by the Americans while under convoy. The condition there was that the master should make the best defence, and without it appeared to a court-martial that he had done so, he was not to be allowed to recover. It was held that this condition was a condition precedent. The same doctrine was applied by that Court to the condition in a policy of insurance against fire, that the party should obtain a certificate from the rector of his parish, and a certain number of the inhabitants, before entitling himself to payment of his claim for loss; *Worsley v. Wood*. If this is a condition precedent, then it must be exactly performed, and nothing can be substituted for it. In this respect there is a difference between a condition precedent and a condition subsequent. The former must be performed before an estate can vest; while the performance of the latter, which is intended to defeat an existing estate, may be dispensed with. The act of God, the king's enemies, or the impossibility of performance, will furnish an excuse as to a condition subsequent. This is a settled principle of our law, and the case of *Brodie v. Todd*⁴ shows that the law of Scotland recognizes the same rule. In that case, Arnot, a merchant of Leith, agreed to purchase from Todd & Co., of Hull, goods which were to be paid for by his acceptance. They put the goods on board a vessel at Hull; enclosed a bill of lading

¹ Bk. 1, tit. 4, p. 98, fol. ed.

³ 3 Douglas, 28.

² Tit. 2, § 8.

⁴ 17 Fac. Col. Dec. 20, May, 1814.

and a draft for the price in a letter, advising Arnot of the shipment, and requesting him to return the draft accepted "in course." This letter was received by Arnot on the morning of the 24th of April, and if answered by him by return of post, the answer might have been received by Todd & Co. on the morning of the 26th. Arnot, however, did not answer it till that day, when he sent back the draft accepted. In the course of the 26th, Todd & Co., not having received the draft as expected, re-landed the goods. Arnot brought an action; and the question was, whether the request to return "in course," meant a return by the earliest post, and constituted a condition precedent. The Lords held that the words meant by return of post, and did constitute a condition precedent, and consequently that no action was maintainable by Arnot, since he had not complied with the condition on which the bargain was made. That case is completely decisive as to what is the doctrine of the Scotch law, and must govern the decision here.

[THE LORD CHANCELLOR. Is it not a question of fact, whether the posting of the letter, in this case, on the 30th of January, was not a compliance with the duty of the party? Here is no distinct stipulation, — it is all matter of inference. The question is, whether putting in the post is not a virtual acceptance, though by the accident of the post it does not arrive. In the case quoted, one whole day was allowed to intervene. But in this case, if putting the letter in the post is a compliance with the condition, there is an end of the question.]

That would be so, if it was a condition subsequent, for then something could be substituted for actual performance. But this is a condition precedent, and must be literally performed.

In considering this question, Lord Jeffrey observed, "The party here only says, 'If I do not hear by return of post.' I have yet to learn that the return of post is like the return of the sun to the meridian at a particular time. I do not think that the use of such a phrase is equivalent to the stipulation of a particular time. I am inclined to hold that the return of post means the actual return of the post. And the *species facti* here was, the letter accepting the offer having been sent in due time to the post-office, that it did [not?] come to hand at the hour at which, according to the usual time required for its transmission, it should have come. But the actual course of *that* post was not till the morning of the 1st February." And the learned Judge justifies his doctrine by referring to the case of the post coming by sea, where a general average time is fixed, but where return of post is not calculated by that average, but by the actual arrival of the post, and then he supposes a universal snow-storm affecting the delivery by land, and argues that if matter of that general notoriety would affect the question, so does any other accident to the post, although not so generally known. But surely this is giving an entirely new interpretation to mercantile contracts, and is making accidental circumstances or natural delays, always counted upon, furnish ground for the construction of a delay occasioned by an accident which neither party anticipated. Besides,

it is clear on the facts here, that had the letter been put into the early post of the 30th January, this accident would not have befallen it; so that the accidental delay in the post-office was really the consequence of the delay in posting the letter, and was so far attributable to the respondents.

They cannot, therefore, claim any advantage from their acceptance of the contract, which acceptance they did not notify, nor condemn the other parties for non-performance of a contract, the acceptance of which they did not know. It is the acceptance which completes the contract. The agreement is not suspended till the offerer has actually received notice of the acceptance, but only until he might have received notice, had that notice been forwarded at the earliest moment. This is the rule declared in Bell's Principles of the Law of Scotland,¹ and this rule must be applied to, and must govern the decision of, the present case.

Mr. *Stuart Wortley* and Mr. *Hugh Hill*, for the respondents, were not called on.

THE LORD CHANCELLOR.² My Lords, every thing which learning or ingenuity can suggest on the part of the appellants has undoubtedly been suggested on the part of the learned counsel who have just addressed the House; and if your Lordships concur in my view, that they have failed in making out their case, you will have the satisfaction of knowing that you have come to that conclusion after having had every thing suggested to you that by possibility could be advanced in favor of this appeal.

The case certainly appears to me one which requires great ingenuity on the part of the appellants, because I do not think that, in the facts of the case, there is any thing to warrant the appeal. The contest arises from an order sent from Liverpool to Glasgow, or rather a proposition sent from Glasgow to Liverpool, and accepted by the house at Liverpool. It is unnecessary to go earlier into the history of the case than the letter sent from Liverpool by Higgins, bearing date the 31st of January. A proposition had been made by the Glasgow house of Dunlop, Wilson, & Co., to sell 2,000 tons of pig-iron. The answer is of that date of the 31st of January: "Gentlemen, we will take the 2,000 tons, pigs, you offer us." Another part of the letter refers to other arrangements; but there is a distinct and positive offer to take the 2,000 tons of pigs. To that letter there is annexed a postscript in which they say, "We have accepted your offer unconditionally; but we hope you will accede to our request as to delivery and mode of payment by two months' bill."

That, my Lords, therefore, is an unconditional acceptance, by the

¹ Page 35, § 78.

² The parts omitted relate to a question of damages depending upon the local law of Scotland. — Ed.

³ Lord Cottenham. — Ed.

letter dated the 31st of January, which was proved to have been put into the post-office at Liverpool on the 30th; but it was not delivered, owing to the state of severe frost at that time, which delayed the mail from reaching Glasgow at the time at which, in the ordinary course, it would have arrived there. The letter having been put in on the 30th of January, it ought to have arrived at Glasgow on the following day, but it did not arrive till the 1st of February.

It appears that between the time of writing the offer and the 1st of February, the parties making the offer had changed their minds; and instead of being willing to sell 2,000 tons of pig-iron on the terms proposed, they were anxious to be relieved from that stipulation; and on that day, the 1st of February, they say, "We have yours of yesterday, but are sorry that we cannot enter the 2,000 tons of pig-iron, our offer of the 28th not having been accepted in course."

Under these circumstances, the parties wishing to buy, and by their letter accepting the offer, instituted proceedings in the Court of Session for damages sustained by the non-performance of the contract. And the first question raised by the first exception applies not to the summing up of the learned Judge, but to the admission of evidence by him; for connected with that admission of evidence is the first exception. I need hardly say but little on this point, but as it formed part of the proceedings on which the judgment must ultimately be pronounced, I will very shortly call your Lordships' attention to the proposition presented for your decision by that first exception.

My Lords, the exception states, "that the pursuers having admitted that they were bound to answer the defenders' offer of the 28th, by letter written and posted on the 30th, and the only answer received by the defenders being admitted to be dated on the 31st of January, and received in Glasgow by the mail which in due course ought to bring the Liverpool letters of the 31st, but not Liverpool letters of the 30th, it is not competent in a question as to the right of the defenders to withdraw or fall from the offer, to prove that the letter bearing date the 31st of January was written and despatched from Liverpool on the 30th, and prevented by accident from reaching Glasgow in due course, especially as it is not alleged that the defenders were aware (previous to the 3d of February) of any such accident having occurred."

The counsel for the pursuer answered that nothing had been stated, but that the pursuers were bound instantly to answer the defenders' offer of the 28th of January, and that, according to the practice of merchants, it was sufficient if that letter was answered on that day on which it was received.

The Lord Justice General did overrule the objection, and admitted the evidence.

The exception is that the learned judge was wrong in permitting the pursuer to explain his mistake. The proposition is, that if a man is bound to answer a letter on a particular day, and by mistake puts a

date in advance, he is to be bound by his error, whether it produces mischief to the other party or not. It is unnecessary to do more than state this proposition in order to induce you to assent to the view I take of the objection, and to come to the conclusion that the learned Judge was right in allowing the pursuer to go into evidence to show the mistake.

I pass on then to the fourth exception which is connected with this point, and which states that his Lordship did not direct the jury in point of law, that, in the case above supposed, if an answer arrives, bearing a date beyond the time limited as above for making answer, and arrives by a mail, and is delivered at a time, corresponding to such date, the offerer is entitled to consider himself free to deal with the goods as his own, either to sell or to hold, if he was not in the knowledge that the answer received was duly written at an earlier date, and delayed in its arrival by accident; that is to say, that if a letter bears a date which, on the face of it, shows that it was written erroneously, nevertheless the party is bound by the date so written on the face of the letter, and you cannot go into the circumstances to explain how it happened that the letter did not arrive in time, but that you are bound to assume that it arrived on the day mentioned, and the party cannot give any evidence in explanation.

My Lords, that falls with the other exception, and the two together go for nothing. I merely state it for the purpose of asking your Lordships to concur in the opinion that I have formed — that the learned Judge was correct in the mode in which he left the question to the jury, and consequently that on that point the bill of exceptions cannot be supported.

The next exception to be considered is the second, and that raises a more important question, though not one attended with much difficulty. The exception is, that his Lordship did direct the jury in point of law, that if the pursuers posted their acceptance of the offer in due time, according to the usage of trade, they are not responsible for any casualties in the post-office establishment.

Now, there may be some little ambiguity in the construction of that proposition. It proceeds on the assumption that, by the usage of trade, an answer ought to have been returned by the post, and that the 30th was the right day on which that answer ought to have been notified. Then comes the question, whether under those circumstances, that being the usage of trade, the fact of the letter being delayed, not by the act of the party sending it, but by an accident connected with the post, the party so putting the letter in on the right day is to lose the benefit which would have belonged to him if the letter had arrived in due course?

I cannot conceive, if that is the right construction of the direction of the learned Judge, how any doubt can exist on the point. If a party does all that he can do, that is all that is called for. If there is a usage of trade to accept such an offer, and to return an answer to

such an offer, and to forward it by means of the post, and if the party accepting the offer puts his letter into the post on the correct day, has he not done every thing he was bound to do? How can he be responsible for that over which he has no control? It is not the same as if the date of the party's acceptance of the offer had been the subject of a special contract: as if the contract had been, "I make you this offer, but you must return me an answer on the 30th, and on the earliest post of that day." The usage of trade would require an answer on the day on which the offer was received, and Messrs. Higgins, therefore, did on the 30th, in proper time, return an answer by the right conveyance — the post-office.

If that was not correct, and if you were to have reference now to any usage constituting the contract between the parties a specific contract, it is quite clear to me that the rule of law would necessarily be that which has obtained by the usage of trade. It has been so decided in cases in England, and none has been cited from Scotland which controverts that proposition; but the cases in England put it beyond all doubt. It is not disputed — it is a very frequent occurrence — that a party having a bill of exchange, which he tenders for payment to the acceptor, and payment is refused, is bound to give the earliest notice to the drawer. That person may be resident many miles distant from him; if he puts a letter into the post at the right time, it has been held quite sufficient; he has done all that he is expected to do as far as he is concerned; he has put the letter into the post, and whether that letter be delivered or not, is a matter quite immaterial, because for accidents happening at the post-office he is not responsible.

My Lords, the case of *Stocken v. Collin*¹ is precisely a case of that nature, where the letter did not arrive in time. In that case Baron Parke says, "It was a question for the jury whether the letter was put into the post-office in time for delivery on the 28th. The post-office mark certainly raised a presumption to the contrary, but it was not conclusive. The jurors have believed the testimony of the witness who posted the letter, and the verdict was therefore right. If a party puts a notice of dishonor into the post, so that in due course of delivery it would arrive in time, he has done all that can be required of him, and it is no fault of his if delay occurs in the delivery." Baron Alderson says, "The party who sends the notice is not answerable for the blunder of the post-office. I remember to have held so in a case on the Norfolk Circuit, where a notice addressed to Norwich had been sent to Warwick. If the doctrine that the post-office is only the agent for the delivery of the notice was correct, no one could safely avail himself of that mode of transmission. The real question is whether the party has been guilty of laches."

There is also the other case which has been referred to, which declares the same doctrine, the case of *Adams v. Lindsell*. That is a case

where the letter went, by the error of the party sending it, to the wrong place, but the party receiving it answered it, so far as he was concerned, in proper time. The party, however, who originally sent the offer not receiving the answer in proper time, thought he was discharged, and entered into a contract and sold the goods to somebody else. The question was, whether the party making the offer had a right to withdraw after notice of acceptance. He sold the goods after the party had written the letter of acceptance, but before it arrived he said, "I withdraw my offer." Therefore he said, "before I received your acceptance of my offer I had withdrawn it." And that raised the question when the acceptance took place, and what constituted the acceptance. It was argued, that "till the plaintiff's answer was actually received, there could be no binding contract between the parties, and that before then the defendants had retracted their offer by selling the wool to other persons." But the Court said, "If that were so, no contract could ever be completed by the post, for if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs, and then the contract is completed by the acceptance of it by the latter."

Those two cases leave no doubt at all on the subject. Common sense tells us that transactions cannot go on without such a rule, and these cases seem to be the leading cases on the subject, and we have heard no authority cited which in the least degree affects the principle on which they proceed. The law of Scotland appears to be the same as the law of England, for Mr. Bell's Commentary lays down the same rule as existing in Scotland, and nothing has been stated to us in contradiction of his opinion.

Now whether I take that proposition as conclusive upon the objection, or whether I consider it as a question entirely open, whether the putting the letter into the post was, or not, in time to constitute a valid acceptance, it appears to me that the learned Judge was right in the conclusion to which he came, that he was right in the mode in which he left the question to the jury, and that he was not bound to lay down the law in the manner alleged in the bill of exceptions.

The next exception is the third, which says, "In so far as his Lordship did not direct the jury in point of law, that if a merchant makes an offer to a party at a distance, by post letter, requiring to be answered within a certain time, and no answer arrives within such time as it should arrive, if the party had written and posted his letter within the time allowed, the offerer is free, though the answer may have actually been written and posted in due time, if he is not proved to be aware of accidental circumstances preventing the due arrival of the answer."

That, my Lords, raises first of all a proposition that does not arise in this case at all. It assumes a contract that requires an answer within a certain stipulated time, and it assumes (which is already disposed of by what I have said in answer to the second exception) that the putting a letter into the post is not a compliance with the requisition of the offer. But there is no special contract here, and therefore this exception cannot be maintained.

I believe that in these remarks I have exhausted the whole of the objections made; and my advice to your Lordships is to affirm the judgment of the Court from which this is appealed.

It was ordered that the interlocutor complained of should be affirmed, with costs.

OFFORD v. DAVIES AND ANOTHER. ¹

IN THE COMMON PLEAS, JUNE 2, 1862.

[Reported in 12 Common Bench Reports, New Series, 748.]

THIS was an action upon a guaranty. The first count of the declaration stated, that, by a certain instrument in writing signed by the defendants, and addressed and delivered by the defendants to the plaintiff, the defendants undertook, promised, and agreed with the plaintiff in the words and figures following, that is to say: "We, the undersigned, in consideration of your discounting, at our request, bills of exchange for Messrs. Davies & Co., of Newtown, Montgomeryshire, drapers, hereby jointly and severally guarantee *for the space of twelve calendar months* the due payment of all such bills of exchange, to the extent of 600*l.* And we further jointly and severally undertake to make good any loss or expenses you may sustain or incur in consequence of advancing Messrs. Davies & Co. such moneys." Averment, that the plaintiff, relying on the said promise of the defendants, after the making of the said promise, and within the space of twelve calendar months thereafter, did discount divers bills of exchange for the said Messrs. Davies & Co., of Newtown aforesaid, certain of which bills of exchange became due and payable before the commencement of this suit, but were not then or at any other time duly paid, and the said bills respectively were dishonored; and that the plaintiff, after the making of the said promise, and within the said twelve calendar months, advanced to the said Messrs. Davies & Co. divers sums of money on and in respect of the discount of the said last-mentioned bills so dishonored as aforesaid, certain of which moneys were due and owing to the plaintiff before and at the time of the commencement of this suit;

¹ See *supra*, p. 28, n. 2. — ED.

and that all things had happened and all times had elapsed necessary, &c. ; yet that the defendants broke their said promise, and did not pay to the plaintiff, or to the respective holders for the time being of the said bills of exchange so dishonored as aforesaid, or to any other person entitled to receive the same, the respective sums of money payable by the said bills of exchange ; nor did the defendants pay to the plaintiff the said sums of money so advanced by the plaintiff as aforesaid, or any part thereof ; whereby the sums payable by the said bills of exchange so dishonored as aforesaid became lost to the plaintiff, and he became liable to pay and take up certain of the said bills of exchange, and did pay and take up certain of the said bills of exchange, and was forced and obliged to and did expend certain moneys in endeavoring to obtain part of certain of the said bills of exchange, and the plaintiff lost the interest which he might have made of his moneys, if the said bills had been duly paid at maturity.

Fourth plea, to the first count, — so far as the same relates to the sums payable by the defendants in respect of the sums of money payable by the said bills of exchange, and the said sums so advanced, — that, after the making of the said guaranty, and before the plaintiff had discounted such bills of exchange, and before he had advanced such sums of money, the defendants countermanded the said guaranty, and requested the plaintiff not to discount such bills of exchange, and not to advance such moneys.

To this plea the plaintiff demurred ; the ground of demurrer stated in the margin being “ that the fourth plea offers no defence to that part of the declaration to which it is pleaded, for that a party giving a guaranty [for a definite period] has no power to countermand it without the assent of the person to whom it is given.” Joinder.

Prentice (with whom was *Brandt*), in support of the demurrer. A guaranty like this, to secure advances for twelve months, is a contract which cannot be rescinded or countermanded within that time without the assent of the person to whom it is given. [BYLES, J. What consideration have these defendants received ?] For any thing disclosed by the plea, the plaintiff might have altered his position in consequence of the guaranty, by having entered into a contract with Davies & Co., of Newtown, to discount their bills for twelve months. In *Calvert v. Gordon*, 1 M. & R. 497, 7 B. & C. 809, 3 M. & R. 124, it was held that the obligor of a bond conditioned for the faithful service of A. whilst in the employ of B. cannot discharge himself by giving notice that after a certain period he will be no longer answerable ; nor can the personal representative of the obligor discharge himself by such a notice.¹ Lord Tenterden, in giving judgment in that case, says (3 M. & R. 128) : “ The only question raised by the defendant's second plea is, whether it is competent to the surety to

¹ And see *Gordon v. Calvert*, 2 Sim. 253, 4 Russ. 581, where an injunction to restrain proceedings at law upon the bond was dissolved.

put an end to his liability by giving a notice which is to take effect from the very day on which it is given. It would be a hardship upon the master if this could be done. It is said that it would be a hardship on the surety if this liability must necessarily continue during the whole time that the principal remains in his service; but, looking at the instrument itself, it would appear that it was the intention of the testator to enter into this unlimited engagement. It was competent to him to stipulate that he should be discharged from all future liability after a specified time, after notice given. This he has not done." Here, the defendants *have* stipulated that their liability shall discontinue at the end of twelve calendar months. What pretence is there for relieving them from that bargain? [BYLES, J. Suppose a man gives an open guaranty, with a stipulation that he will not withdraw it, — what is there to bind him to that?] If acted upon by the other party, it is submitted that that *would* be a binding contract. *Hassell v. Long*, 2 M. & Selw. 363, is an authority to the same effect as *Calvert v. Gordon*. In Pothier on Obligations, Part II. c. 6, § 7, art. 2, p. 442, it is said, "When the obligation to which a surety has acceded must from its nature exist a certain time, however long it may be, the surety cannot within that time demand that the principal debtor should discharge him from it; for as he knew, or ought to know, the nature of the obligation to which he acceded, he should have reckoned upon continuing obliged during the whole of the time." Again, Part III. c. 6, art. 4, p. 635: "Regularly, lapse of time does not extinguish obligations: persons who enter into an obligation oblige themselves and their heirs until the obligation is perfectly accomplished. But there may be a valid agreement that an obligation shall only continue to a certain time. For instance, I may become surety for a person upon condition that my undertaking shall not bind me after the expiration of three years."

E. James, Q. C. (with whom was *T. Jones*), contra. The cases upon bonds for guaranteeing the honesty of clerks or servants are inapplicable: there the contract attaches as soon as the clerk or servant enters the service, and it is not separable. This, however, is not a case of contract at all. It is a mere authority to discount, and a promise to indemnify the plaintiff in respect of each bill discounted; and it was perfectly competent to the defendants at any time to withdraw that authority as to future transactions of discount. This is more like the *mandatum pecuniæ credendæ* treated of by Pothier — on Obligations, Part II. c. 6, § 8, art. 1. If so, it is subject to all incidents of a mandate or authority. [WILLES, J. *Mandatum* does not mean a bare authority which may be revoked.] In Story on Agency, the learned author, having stated in § 463, that, "in general, the principal has a right to determine or revoke the authority given to his agent, at his own mere pleasure," proceeds in § 464: "The civil law contained an equally broad doctrine. Si mandevero exigendam pecuniam, deinde voluntatem mutavero, an sit mandati actio vel mihi, vel hæredibus meo?"

Et ait Marcellus, cessare mandati actionem, quia extinctum est mandatum, finitâ voluntate.¹ The same principle has infused itself into the jurisprudence of modern Europe, as, indeed, it could not fail to do, since it is but an application of a maxim founded upon the natural rights of men in all ages, in regard to their own private concerns, where the law has not interfered to prohibit the exercise of them." "But," § 466, "let us suppose that the authority has been in part actually executed by the agent; in that case, the question will arise whether the principal can revoke the authority, either in the whole or as to the part which remains unexecuted. The true principle would seem to be, that, if the authority admits of severance, or of being revoked as to the part which is unexecuted, either as to the agent or as to third persons, then and in such case the revocation will be good as to the part unexecuted, but not as to the part already executed." A mutual agreement to rescind can only be necessary where there is a mutual contract. But, in a case like this, where there is no complete contract until something is done by the mandatory, the assent of both parties cannot be required. Suppose Davies & Co., of Newtown, had become notoriously insolvent, would the defendants continue bound by their guaranty, if the plaintiffs, with notice of that fact, chose to go on discounting for them? [WILLIAMS, J. Suppose I guarantee the price of a carriage, to be built for a third party who, before the carriage is finished, and consequently before I am bound to pay for it, becomes insolvent, — may I recall my guaranty?] Not after the coach-builder has commenced the carriage. [ERLE, C. J. Before it ripens into a contract, either party may withdraw, and so put an end to the matter. But the moment the coach-builder has prepared the materials, he would probably be found by the jury to have contracted.] In an American work of considerable authority, Parsons on Contracts, p. 517, it is said, "A promise of guaranty is always revocable, at the pleasure of the guarantor, by sufficient notice, unless it be made to cover some specific transaction which is not yet exhausted, or unless it be founded upon a continuing consideration, the benefit of which the guarantor cannot or does not renounce. If the promise be to guarantee the payment of goods sold up to a certain amount, and, after a part has been delivered, the guaranty is revoked, it would seem that the revocation is good, unless it be founded upon a consideration which has been paid to the guarantor for the whole amount; or unless the seller has, in reliance on the guaranty, not only delivered a part to the buyer, but bound himself by a contract, enforceable at law, to deliver the residue." *Brocklebank v. Moore*, cor. Abbott, C. J., Guildhall Sittings after Trinity Term, 1823, referred to in 2 Stark. Evid., 3d edit. 510, n., is a direct authority that "a continuing guaranty is countermandable by parol." And the same principle is clearly deducible from *Mason v. Pritchard*, 12 East, 227. [WILLIAMS, J. That would have

¹ D. 17, 1, 12, 16. — ED.

been applicable, if this had been a guaranty for 600*l.*, with no mention of the twelve calendar months.] The mention of twelve months would not compel the plaintiff to go on discounting for that period. In *Holland v. Teed*, 7 Hare, 50, under a guaranty given to a banking-house consisting of several partners, for the repayment of such bills drawn upon them by one of their customers as the bank might honor, and any advances they might make to the same customer, within a certain time, it was held that the guaranty ceased upon the death of one of the partners in the bank before the expiration of the time to which the guaranty was expressed to extend; that bills accepted before the death of the partner, and payable afterwards, were within the guaranty; and that the amount guaranteed could not be increased by any act of the continuing firm and the customer after the death of the partner, although such amount might be diminished by such act. [BYLES, J. The case of a change in the firm is now provided for by the Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, § 4. ERLE, C. J. What meaning do you attribute to the words "at our request" in this guaranty?] As and when we request. The notice operated a retraction of the request, and any discount which took place after that notice was not a discount at the request of the defendants.

Brandt, in reply. The Court of Exchequer have decided in this term, in a case of *Bradbury v. Morgan*,¹ that the death of the surety does not operate a revocation of a continuing guaranty. If that be so, it is plain that the guaranty is not a mere *mandatum*, but a contract. In *Gordon v. Calvert*, 2 Sim. 253, 4 Russ. 581, the executrix of the deceased surety gave notice to Calvert & Co., the obligees, that she would no longer consider herself liable on the bond; but the Vice-Chancellor (Sir L. Shadwell) said, that, "by the original contract, the liability of the surety was to continue as long as Calvert & Co. kept Richard Edwards, or he chose to remain in their service; that after Calvert & Co. had received the plaintiff's letter they never gave her any intimation that they did not consider her as continuing liable under her husband's bond; that their conduct did not operate in any manner upon her; and that therefore the injunction ought to be dissolved." That shows that, in the opinion of that learned Judge, the assent of the three persons concerned and interested in the bargain would be

¹ Since reported, 31 Law J. Exch. 462; [1 H. & C. 249]. There the guaranty was in the following terms: "Messrs. Bradbury & Co.,—I request you will give credit in the usual way of your business to H. L.; and, in consideration of your doing so, I do hereby engage to guarantee the regular payment of the running balance of his account with you, until I give you notice to the contrary, to the extent of 100*l.*:" and it was held, that the liability was not determined by the death of the surety, but that his executors were liable to Bradbury & Co. for goods sold and credit given to H. L. subsequently to the surety's death,—on the ground (contrary to the doctrine laid down in Smith's Mercantile Law, 4th edit. 425, 6th edit. 477, and adopted in Williams on Executors, 5th edit. 1604) that the guaranty was a *contract* to be answerable to the extent stipulated for credit given to the principal debtor, until the creditors should receive a notice to put an end to it.

requisite to its dissolution. The fourth plea does not allege that notice of revocation was given before any bills had been discounted by the plaintiffs. It must therefore be assumed that some discounts had taken place. [*T. Jones.* The fact undoubtedly is so.]

Cur. adv. vult.

ERLE, C. J., now delivered the judgment of the Court.

The declaration alleged a contract by the defendants, in consideration that the plaintiff would, at the request of the defendants, discount bills for Davies & Co., not exceeding 600*l.*, the defendants promised to guarantee the repayment of such discounts *for twelve months*, and the discount, and no repayment. The plea was a revocation of the promise before the discount in question; and the demurrer raised the question whether the defendants had a right to revoke the promise. We are of opinion that they had, and that, consequently, the plea is good.

This promise by itself creates no obligation.¹ It is in effect conditioned to be binding if the plaintiff acts upon it, either to the benefit of the defendants or to the detriment of himself. But, until the condition has been at least in part fulfilled, the defendants have the power of revoking it. In the case of a simple guaranty for a proposed loan, the right of revocation before the proposal has been acted on did not appear to be disputed. Then are the rights of the parties affected either by the promise being expressed to be for twelve months, or by the fact that the same discounts had been made before that now in question, and repaid? We think not.

The promise to repay for twelve months creates no additional liability on the guarantor, but, on the contrary, fixes a limit in time beyond which his liability cannot extend. And, with respect to other discounts, which had been repaid, we consider each discount as a separate transaction, creating a liability on the defendant till it is repaid, and after repayment leaving the promise to have the same operation that it had before any discount was made, and no more.

Judgment for the defendants.

¹ "A great number of cases are of contracts not binding on both sides at the time when made, and in which the whole duty to be performed rests with one of the contracting parties. A guaranty falls under that class; when a person says, 'In case you choose to employ this man as your agent for a week, I will be responsible for all such sums as he shall receive during that time, and neglect to pay over to you,' the party indemnified is not therefore bound to employ the person designated by the guaranty; but if he do employ him, then the guaranty attaches and becomes binding on the party who gave it." *Parke, B., Kenneway v. Treleavan*, 5 M. & W. 498, 501. "Suppose I say, if you will furnish goods to a third person, I will guarantee the payment: there you are not bound to furnish them; yet if you do furnish them in pursuance of the contract, you may sue me on my guaranty." *Patteson, J., Morton v. Burn*, 7 Ad. & El. 19, 23. — *Ed.*

RAFFLES v. WICHELHAUS AND ANOTHER.

IN THE EXCHEQUER, JANUARY 20, 1864.

[Reported in 2 Hurlstone & Coltman, 906.]

DECLARATION: for that it was agreed between the plaintiff and the defendants, to wit, at Liverpool, that the plaintiff should sell to the defendants, and the defendants buy of the plaintiff, certain goods, to wit, 125 bales of Surat cotton, guaranteed middling fair merchant's Dhollerah, to arrive ex "Peerless" from Bombay; and that the cotton should be taken from the quay, and that the defendants would pay the plaintiff for the same at a certain rate, to wit, at the rate of $17\frac{1}{4}d.$ per pound, within a certain time then agreed upon after the arrival of the said goods in England. Averments: that the said goods did arrive by the said ship from Bombay in England, to wit, at Liverpool, and the plaintiff was then and there ready and willing and offered to deliver the said goods to the defendants, &c. Breach: that the defendants refused to accept the said goods or pay the plaintiff for them.

Plea: that the said ship mentioned in the said agreement was meant and intended by the defendants to be the ship called the "Peerless," which sailed from Bombay, to wit, in October; and that the plaintiff was not ready and willing and did not offer to deliver to the defendants any bales of cotton which arrived by the last-mentioned ship, but instead thereof was only ready and willing and offered to deliver to the defendants 125 bales of Surat cotton which arrived by another and different ship, which was also called the "Peerless," and which sailed from Bombay, to wit, in December.

Demurrer, and joinder therein.

Milward, in support of the demurrer. The contract was for the sale of a number of bales of cotton of a particular description, which the plaintiff was ready to deliver. It is immaterial by what ship the cotton was to arrive, so that it was a ship called the "Peerless." The words "to arrive ex 'Peerless'" only mean that, if the vessel is lost on the voyage, the contract is to be at an end. [POLLOCK, C. B. It would be a question for the jury whether both parties meant the same ship called the "Peerless."] That would be so if the contract was for the sale of a ship called the "Peerless;" but it is for the sale of cotton on board a ship of that name. [POLLOCK, C. B. The defendant only bought that cotton which was to arrive by a particular ship. It may as well be said, that, if there is a contract for the purchase of certain goods in warehouse A., that is satisfied by the delivery of goods of the same description in warehouse B.] In that case there would be goods in both warehouses; here it does not appear that the plaintiff had any goods on board the other "Peerless."

[MARTIN, B. It is imposing on the defendant a contract different from that which he entered into. POLLOCK, C. B. It is like a contract for the purchase of wine coming from a particular estate in France or Spain, where there are two estates of that name.] The defendant has no right to contradict by parol evidence a written contract good upon the face of it. He does not impute misrepresentation or fraud, but only says that he fancied the ship was a different one. Intention is of no avail, unless stated at the time of the contract. [POLLOCK, C. B. One vessel sailed in October and the other in December.] The time of sailing is no part of the contract.

Mellish (Cohen with him), in support of the plea. There is nothing on the face of the contract to show that any particular ship called the "Peerless" was meant; but the moment it appears that two ships called the "Peerless" were about to sail from Bombay, there is a latent ambiguity, and parol evidence may be given for the purpose of showing that the defendant meant one "Peerless" and the plaintiff another. That being so, there was no *consensus ad idem*, and therefore no binding contract. [He was then stopped by the Court.]

PER CURIAM. There must be judgment for the defendants.

Judgment for the defendants

RAMSGATE VICTORIA HOTEL COMPANY LIMITED
v. MONTEFIORE.

SAME v. GOLDSMID.

IN THE EXCHEQUER, JANUARY 17, 1866.

[*Reported in Law Reports, 1 Exchequer, 109.*]

THESE were actions for non-acceptance of shares, and for calls and cross-actions for recovery of deposit, and for damages for not duly allotting shares, turned into a special case.

The company was completely registered 6th June, 1864. By the second article of association it was provided that the company should continue incorporated, notwithstanding that the whole number of shares in the company might not be subscribed for or issued, and might commence and carry on business when, in the judgment of the board, a sufficient number of shares had been subscribed to justify them in so doing.

The prospectus of the company contained the following words: "Deposit on application 1*l.* per share, and 4*l.* on allotment." And it was further stated that if no allotment were made the deposit would be returned.

The defendant Montefiore, on the 8th of June, 1864, filled up, signed

and sent to the directors the printed form of application annexed to the prospectus, which was as follows:—

GENTLEMEN, — Having paid to your bankers the sum of 50*l.*, I hereby request you will allot me fifty shares of 20*l.* each in the Ramsgate Victoria Hotel Company (Limited); and I hereby agree to accept such shares, or any smaller number that may be allotted to me, to pay the deposit and calls thereon, and to sign the articles of association of the company at such times and in such manner as you may appoint.

The defendant had so paid the sum of 50*l.*, and had taken from the bankers the following receipt:—

Received, the 8th of June, 1864, on account of the directors of the Ramsgate Victoria Hotel Company (Limited), the sum of 50*l.*, being the deposit paid in accordance with the terms of the prospectus, on an application for an allotment of fifty shares in the same undertaking.

On the 17th of August the secretary made out and submitted to the directors a list of applicants for shares up to that time, in which appeared the name of the defendant for fifty shares. The list was headed: “List of subscribers, August 17, 1864.”

On the 2d of November the secretary again submitted a list of subscribers to the directors, but they did not deem it advisable to proceed to an immediate allotment, and entered a minute to that effect. On the 8th of November, the defendant, having received no communication from the company, withdrew his application.

On the 23d of November the secretary prepared another list of subscribers, including the defendant's name. The directors made the first call, and by their direction the secretary wrote the following letter to the defendant:—

SIR, — I am instructed by the directors to acquaint you that, in compliance with your application, they have allotted to you fifty shares in this company, and have entered your name in the register of shareholders for the same; and I have to request that you will pay the balance of the first call, as noted below, on or before the 15th December, to the London and County Bank, 21 Lombard Street, E. C.

The defendant having refused to accept the shares or pay the call, the company brought the present action against him.

It was contended by the company that the last-mentioned list and those previously mentioned, or one of them, constituted a sufficient register of shares within the Companies' Act, 1862.

The directors had entered into an agreement for the purchase of the site of the hotel, paid the deposit, and commenced operations.

The facts with respect to Goldsmid were the same, except that he had never withdrawn his application, nor given any notice of his intention to do so.

Mellish, Q. C. (*Digby* with him), for the company, contended that,

although in ordinary cases the assent of both parties, mutually communicated, was necessary to form a contract, yet on the authority of *Ex parte Bloxam*¹ and *Ex parte Cookney*² shares might be completely allotted without any communication to the applicant, or acceptance by him; that the facts above stated showed an allotment made on the 17th of August; but that, if not, the allotment in November was, considering the nature of the contract, made within a reasonable time, and, if so made, the letter of withdrawal was inoperative.

M. Chambers, Q. C. (*Cohen* with him), for the defendants, was not called on.

THE COURT (POLLOCK, C. B., MARTIN, CHANNELL, PIGOTT, BB.) observed that, in both cases cited, the question was as to the liability of an applicant for shares as a contributory, and they referred to the judgment of Turner, L. J., in *Ex parte Bloxam*,³ as explaining the *ratio decidendi* in that case; they held that there was no allotment till November 23, that the allotment must be made within reasonable time, and that the interval from June to November was not reasonable, and therefore gave

Judgment for both the defendants.

IN RE NATIONAL SAVINGS BANK ASSOCIATION.

HEBB'S CASE.

IN CHANCERY, MAY 1, 1867.

[*Reported in Law Reports, 4 Equity, 9.*]

THIS was an application by Henry Kirke Hebb, that his name might be removed from the list of contributories of the National Savings Bank Association, a company formed under the Joint Stock Companies' Act, 1856, and now being wound up under the Companies' Act, 1862.

On the 28th of August, 1857, Hebb signed and gave to the agent of the company at Lincoln an application for ten shares in a form provided by the company, and at the same time paid to the agent a deposit of 5s. per share, for which the agent gave him a receipt, with a memorandum that a duly authorized receipt would be forwarded from the head office within eight days.

On the 4th of September, 1857, the directors allotted ten shares to Hebb, and entered his name in the allotment book, and on the same day sent to their agent at Lincoln the letter of allotment with a receipt for the deposit signed by two directors, but the agent did not deliver the letter and receipt to Hebb until the 9th of September. In the

¹ 33 L. J. (Ch.) 519, 574.

² 3 De G. & J. 170; 28 L. J. (Ch.) 12.

³ 33 L. J. (Ch.) 575, 576.

mean time, on the 8th of September, Hebb wrote a letter to the directors, withdrawing his application, and requesting the return of the deposit.

On the 26th of August, 1858, Hebb having insisted upon repudiating the allotment, and threatened to sue the company for the deposit, the directors paid him the deposit. The allotment was not formally cancelled, and Hebb's name remained on the register of shareholders, but he had no further communication from the company until June, 1866, when the company was ordered to be wound up.

Mr. *De Gex*, Q. C., for the applicant.

First. The applicant never became a shareholder within the meaning of the Joint Stock Companies' Act, 1856, § 19, inasmuch as he never accepted any shares, having withdrawn his application before its acceptance by the directors was communicated to him. A contract is not binding until the party who has made the proposal has received from the other party notice that the latter has accepted it. *Routledge v. Grant*. So long as the letter of allotment remained in the hands of their agent the company might have cancelled the allotment, and the applicant could not have compelled them to give him the shares; and, on the other hand, he was entitled to withdraw his application.

[Mr. *Roxburgh*, Q. C., *amicus curiæ*. In *Pellatt's Case*,¹ although there was no decision upon the point, the Lords Justices expressed an opinion, that notice of allotment was necessary to complete the contract, and that in *Bloxam's Case*² the decision must have been founded on the assumption that *Bloxam* knew of the allotment, though he had no formal notice.]

Secondly. If there was a binding contract, it was annulled when the deposit was returned, and it has been so treated by both parties ever since. It was competent to the company to annul it, and the directors could exercise this power on behalf of the company. *Ex parte Beresford*; ³ *Ex parte Miles*.⁴ Where there is a *bona fide* dispute as to the validity of a contract to take shares, the directors may compromise it, or release the alleged shareholder from the contract. *Lord Belhaven's Case*.⁵ And even if the directors had no such power, the consent of the shareholders would be presumed after the lapse of so many years. *Brotherhood's Case*.⁶

Mr. *Baggallay*, Q. C., and Mr. *J. Napier Higgins*, for the official liquidator.

First. The contract was complete as soon as the shares were allotted. The directors could not, either as against the applicant, or as against the other shareholders, have recalled the allotment, whether or not it had been notified to the applicant, and the applicant might at any time after the 4th of September, 1857, have enforced specific performance. It has never been decided that notice of acceptance is necessary to

¹ Law Rep. 2 Ch. 527.

² 33 L. J. (Ch.) 519, 574.

³ 2 Mac. & G. 197.

⁴ 34 L. J. (Ch.) 123.

⁵ 3 D. J. & S. 41.

⁶ 31 Beav. 365; on appeal, 8 Jur. (n. s.) 926.

complete a contract. In *Routledge v. Grant* there was no acceptance of the offer; in *Ex parte Miles*,¹ before any allotment was made, both parties agreed to vary the contract; in *Pellatt's Case*² there was no decision on this point. In *Dunlop v. Higgins* it was held that a contract was complete as soon as a letter was posted accepting the offer. [They also referred to *Chitty on Contracts*.]³

Secondly. If the contract was binding, the applicant, having become a shareholder, could only be released by the consent of every shareholder. *Spackman's Case*; ⁴ *Stanhope's Case*.⁵ In *Lord Belhaven's Case*⁶ the deed of settlement expressly empowered the directors to compromise suits, and Lord Belhaven paid a sum of money to be released from the alleged contract; here there was no such power, and in fact there was no compromise.

LORD ROMILLY, M. R. I think that Mr. Hebb is not a contributory of this company. The mere writing of a line in a book is not, in my opinion, an irrevocable act; and if a person applies for shares in a company, and the directors write down his name in the allotment book, they may at any time before the allotment has been communicated to the allottee alter or cancel the allotment; if it were not so, a mere accident might irrevocably bind the company.

These applications for and allotments of shares must be treated upon the same principles as ordinary contracts between individuals. If A. writes to B. a letter offering to buy land of B. for a certain sum of money, and B. accepts the offer, and sends his servant with a letter containing his acceptance, I apprehend that until A. receives the letter, A. may withdraw his offer, and B. may stop his servant on the road and alter the terms of his acceptance, or withdraw it altogether; he is not bound by communicating the acceptance to his own agent. *Dunlop v. Higgins* decides that the posting of a letter accepting an offer constitutes a binding contract, but the reason of that is, that the post-office is the common agent of both parties. In the present case, if Mr. Hebb had authorized the agent of the company to accept the allotment on his behalf there would have been a binding contract, but he gave no such authority, and, as he had withdrawn his original offer before he received the letter of the directors, the position of the parties was changed, and that letter became an offer which required the acceptance of Mr. Hebb to constitute a binding contract.

In *Martin v. Mitchell*⁷ Sir T. Plumer says, "When one party, having entered into a contract that has not been signed by the other, afterwards repents, and refuses to proceed in it, I should have felt great difficulty in saying that he had not a *locus pœnitentiæ*, and was not at liberty to recede until the other had signed, or in some manner made it binding upon himself. How can the contract be complete before it is

¹ 34 L. J. (Ch.) 123.

² Pages 9 *et seq.* (5th edit.).

³ Law Rep. 1 Ch. 161.

⁴ 2 Jac. & W. 413, 428.

⁵ Law Rep. 2 Ch. 527.

⁶ 11 Jur. (N. S.) 207.

⁷ 3 D. J. & S. 41.

mutual? And can it be complete as to the one, and not as to the other?" I am of opinion that an offer does not bind the person who makes it until it has been accepted, and its acceptance has been communicated to him or his agent. Consequently, in my opinion, Mr. Hebb never became a shareholder; but if he had once become a shareholder, I should have felt a difficulty in holding that he had been released from that position by the subsequent return of the deposit. His name must be removed from the list of contributories, and both he and the official liquidator must have their costs out of the estate.

THE BRITISH AND AMERICAN TELEGRAPH COMPANY LIMITED v. COLSON.

IN THE EXCHEQUER, JANUARY 31, 1871.

[*Reported in Law Reports, 6 Exchequer, 108.*]

ACTION for a sum of money alleged to be due from the defendant to the plaintiffs, on an allotment of shares in their company. The first count stated a promise by the defendant that, in consideration the plaintiffs would allot him fifty shares, he would pay 2*l.* upon each of the said shares, and alleged the performance of conditions precedent, and breach by non-payment. In the second count the defendant was sued as a shareholder of fifty shares, for a call of 2*l.* due thereon, with interest.

The defendant (amongst other pleas) pleaded to the first count denial of the allotment; to the second count, never indebted.

Issue.

The cause was tried before Bramwell, B., at Westminster, on the 28th of June, 1870. It was proved that the defendant on the 13th of February, 1867, sent an application to the plaintiffs for fifty shares, the letter of application containing an undertaking "to pay on allotment the deposit of 2*l.* per share;" that, on the 14th, fifty shares were allotted to him at a meeting of directors, and notice of the allotment posted to his address (31 Charlotte Street, Fitzroy Square); and that his name was entered on the register as holder of the fifty shares.

The defendant, however, swore that he had never received the notice; that another person of the same name lived opposite to him in the same street; that about that time the numbers in the street were changed (his own number being changed from 31 to 87), and that several letters then sent to him had never reached him.

On the 28th of February the plaintiffs, on being informed that the notice had not reached the defendant, sent him a duplicate notice, which he refused to accept.

The jury found that the letter of allotment was posted to the defend-

ant on the 14th of February, but that he never received it; and that the second notice was not sent in reasonable time. The learned Judge, acting on *Dunlop v. Higgins*, thereupon directed the verdict to be entered for the plaintiffs; reserving leave to the defendant to move to enter the verdict for him, upon the authority of *Finucane's Case*.¹ A rule having been obtained accordingly,

Nov. 17, *Pollock*, Q. C., and *Lewis*, showed cause. The case is concluded by the authority of *Dunlop v. Higgins*, which shows that a contract is completed by the posting of a letter accepting the offer. The same doctrine was recognized in *Duncan v. Topham*,² which is directly in point, because there the letter of acceptance never reached its destination. In *Finucane's Case*³ neither of these cases was cited, and the case is not a considered one.

[They proceeded to argue upon some clauses of the company's articles of association, but the Court observed that if the defendant was not in fact a shareholder he could not be bound by them.]

Gill, in support of the rule. *Finucane's Case* lays down a sensible rule, namely, that if the defendant not only denies receipt of a posted notice, but also gives a reasonable account of its not reaching him, he will not be liable as if he had received it. The defendant has here satisfied that condition. In *Duncan v. Topham* the point was not argued at length; the case of *Harvey v. Johnston*,³ there referred to, is no authority on the question; and the point now suggested was not raised. It was laid down by Wood, V. C., in *Fletcher's Case*,⁴ that to complete a shareholder's contract it is necessary "that the allotment should be communicated and acquiesced in." It is true the point did not arise there; but in *Hebb's Case*, where, after the allotment had been made, but before it was communicated to the applicant, he withdrew his application, it was held that this was no contract to accept the shares.

Cir. adv. vult.

Jan. 31. The following judgments were delivered:—

KELLY, C. B.⁵ It appears to me that if one proposes to another, by a letter through the post, to enter into a contract for the sale or purchase of goods, or, as in this case, of shares in a company, and the proposal is accepted by letter, and the letter put into the post, the party having proposed the contract is not bound by the acceptance of it until the letter of acceptance is delivered to him or otherwise brought to his knowledge, except (in some cases) where the non-receipt of the acceptance has been occasioned by his own act or default.

The consequences, if the law were as contended for on the part of the plaintiffs, would be such as to work great and obvious injustice in a variety of mercantile transactions of constant occurrence. A mer-

¹ 17 W. R. 813.

² 8 C. B. 225; 18 L. J. (C. P.) 310.

³ 6 C. B. 295; 17 L. J. (C. P.) 298, cited in *Duncan v. Topham* as 7 C. B. 295.

⁴ 37 L. J. (Ch.) at p. 50.

⁵ His Lordship's statement of the case has been omitted.—ED.

chant in London writes to another merchant at Bristol, offering to sell him a quantity of merchandise at the price of 1,000*l.*, and the Bristol merchant by return of post accepts the offer and agrees to become the purchaser; but the letter miscarries and is never received. Would the Bristol merchant be entitled, a week afterwards, to bring an action for the non-delivery of the goods, when the London merchant, from having received no answer to his letter, has sold them to another person? Then, suppose that A., a stock-broker in London, who has been in the habit of making purchases of stock for B. in Liverpool, writes to B. on the 1st of January, "I can offer you 10,000*l.* in 5-20 bonds at 90, but I must require your answer by return of post." B. receives the letter at Liverpool on the morning of the 2d, and writes by the post of that night to A. in London, "I accept the 10,000*l.* 5-20 bonds at 90, and request you will hold them for me until further instructions;" the letter by some accident miscarries, and never reaches the hands of A., who, receiving no reply throughout the 3d of January, sells the stock on the morning of the 4th to another purchaser. B. applies to him ten days after, when the stock has risen 50 per cent, and directs him to sell. If the putting of the letter into the post by B. at Liverpool on the 2d is equivalent to the delivery of it to A. on the 3d, B. is entitled to maintain an action as if it had been delivered, and recover the 50 per cent upon the stock. It is absolutely impossible that such can be the law of this country. Numberless cases of this nature might be put, in which the principle which regulates the making of contracts among mercantile men would be set at naught, if the law be as contended for on the part of the plaintiffs; that principle being that a contract is complete only when a proposal is made by one party, accepted by the other, and the acceptance notified to the maker of the proposal.

The learned Judge in this case directed a verdict for the plaintiffs chiefly, if not wholly, upon the authority of *Dunlop v. Higgins*. But it will be found that this case is no authority at all for the proposition contended for by the plaintiffs, that the putting a letter into the post accepting a contract is equivalent to the delivery of the letter to the person written to, and binds him by the acceptance although it should never have been delivered. The facts of the case of *Dunlop v. Higgins* were these: on the 28th of January, Dunlop & Co., merchants at Glasgow, wrote to Higgins at Liverpool, and put the letter in the post, offering to sell to him 1,000 tons of iron at 65*s.* This letter was delivered at Liverpool to Higgins at 8 A. M. of the 30th of January; the first post for Glasgow left Liverpool on that day at 3 P. M., and the second at 1 A. M. of the 31st. Higgins wrote a letter on the same day, the 30th, accepting the iron, and put it into the post during business hours on that day, that is to say, a little after 3 P. M., which it was not denied was in proper time. This letter should have been delivered in Glasgow about 8 A. M. on the 1st of February, but owing to the bad state of the roads, there being a railway only for a part of the journey, the mail did not arrive at Glasgow till some hours later, and the letter was not delivered

to Dunlop & Co. till about 2 P.M. They afterwards renounced the contract, on the ground that the acceptance had not reached them at 8 A.M., and alleging that in the mean time they had sold the iron to another purchaser. Higgins thereupon brought his action for the non-delivery of the iron pursuant to the contract, and he was held entitled to recover. In this decision of the Court of Session, and the affirmance of it by the House of Lords, I entirely concur, on the plain ground that the acceptance of the contract reached Dunlop & Co. in time; and the judgment which I am about to pronounce is in perfect accordance with it.

It is said, however, that the ground upon which this case was decided was, that the contract was complete and binding upon Dunlop & Co., not upon the acceptance of it by Higgins coming to hand, but upon the putting of the letter into the post by Higgins upon the 30th of January; and it is further insisted that Lord Cottenham laid it down as law, that the putting of a letter into the post accepting a contract is equivalent to the delivery of that letter, although it should never in fact be delivered at all to the person to whom it is addressed.

No such proposition was laid down by Lord Cottenham, or by any other judge, either in the Court of Session or in the House of Lords. The points, indeed, that were taken in argument seem to be quite apart from any just legal view of the case. It was insisted by Dunlop & Co. that, Higgins's letter of acceptance being by mistake dated on the 31st, they had a right to assume, and Higgins had no right to disprove, that it was actually written on that day, and so too late to bind them to the contract. But this objection to the action was rightly overruled in the House of Lords; and it was held that Higgins was at liberty to show, as the fact was, that the letter was written and put into the post on the 30th. It was undoubtedly argued, that the putting of the letter into the post by Higgins on the 30th amounted then and at once to an acceptance of the contract binding upon Dunlop & Co., without reference to the time at which it was delivered, or even if it had never been delivered at all; and upon this point Lord Cottenham treats it as a question of fact, whether the posting of the letter by Higgins on the 30th was or was not a compliance with the duty of the party. He rightly holds that it was; and in his judgment he observes, not that the posting of a letter is equivalent to its delivery, — no such doctrine is to be found throughout his Lordship's judgment, — but that Higgins was not responsible for the delivery according to the course of the post by the post-office, over which he had no control. And this, no doubt, is true; not merely as a general, though somewhat vague and indefinite proposition, but as strictly applicable to the facts of that case, Higgins having been in no wise responsible for the letter, which he posted at Liverpool at a little after 3 P.M. on the 30th, not having reached Glasgow until 2 P.M. instead of 8 A.M. on the 1st of February. This, however, is very different from the proposition that the contract was completed and binding upon Dunlop & Co., not by the delivery to

him of the letter of acceptance on the 1st of February, but by the putting it into the post by Higgins at Liverpool on the 30th. Nothing like this was ever said or suggested by Lord Cottenham or any other judge, and the supposition that such had been the decision of the House of Lords is only to be accounted for by the vague and inaccurate terms of the marginal note to the report of the case.

The other case relied upon for the plaintiffs is *Duncan v. Topham*. There, in an action for non-delivery of goods purchased, in which the contract was alleged to be, to deliver within a reasonable time, the proof was of a contract "that the goods must be put on board directly;" and the judge at the trial having ruled that this evidence supported the declaration, the defendant obtained a rule for a new trial on the ground of variance, and the rule was afterwards made absolute. This decision, therefore, has no application to the present case; but it certainly appears that, upon the trial of the cause, Mr. Justice Cresswell had directed the jury that the contract was complete on the posting of the plaintiff's letter accepting the offer of the goods, notwithstanding it might never have come to the defendant's hands. It does not appear how far this ruling was material in the cause; but, the counsel for the defendant having referred to it as one of the grounds upon which he claimed a rule *nisi* for a new trial, no express judgment is given upon that point; but upon the statement of it, Maule, J., observed: "I think it was the mode of proof in *Harvey v. Johnston*." And Wilde, C. J., observed: "There is also a case of *Dunlop v. Higgins*, in the House of Lords, where the same point was decided." Now, upon looking at the case of *Harvey v. Johnston*, it will be found that no such point arises, and that the decision had no relation to any such question; and all that appears is, that upon an argument as to whether an offer made can be retracted at any time before acceptance, Wilde, C. J., observed: "An order for goods is binding upon the party sending it before the letter accepting the contract is received by him." This case, therefore, of *Harvey v. Johnston* is no authority whatever in support of the proposition contended for; nor, for the reasons before assigned, is the case of *Dunlop v. Higgins*. All that fell from the Court, therefore, in *Duncan v. Topham*, as far as relates to this point, is founded entirely on an erroneous reference by two of the judges to these two cases. There is certainly the opinion of Mr. Justice Cresswell at *Nisi Prius*, which seems to support this doctrine; but I cannot accede to it, notwithstanding the high authority of that learned judge.

It may be, that in general, though not in all cases, a contract takes effect from the time of acceptance, and not from the subsequent notification of it. As in the case now before the Court, if the letter of allotment had been delivered to the defendant in the due course of the post, he would have become a shareholder from the date of the letter. And to this effect is *Potter v. Sanders*. And hence, perhaps, the mistake has arisen that the contract is binding upon both parties at the time

when the letter is written and put into the post, although never delivered; whereas, although it may be binding from the time of acceptance, it is only binding at all when afterwards duly notified.

On the other hand, the authorities are numerous to show that a contract is not complete until the acceptance of it is made known by the one party to the other. In *Pellatt's Case*,¹ Lord Cairns and Turner, L.JJ., lay it down that, upon an application for shares to be allotted, the registration of the shares by the company does not make the applicant a shareholder; and Lord Cairns expressly says,² "I cannot, therefore, consider an application for shares, followed by registration not communicated to Mr. Pellatt, to constitute a completed contract."

In *Gunn's Case*³ it was held by Stuart, V. C., and confirmed on appeal by Rolt, L. J., that upon an application for shares, and on allotment and registration of shares in the name of the applicant, he does not become a shareholder unless he has notice of the allotment; and the Lord Justice, in his judgment, treats an application for an allotment of shares and an ordinary commercial contract as identical. His language⁴ is directly applicable to the present case: "There must be the consent of two parties to a contract. One man may make an offer to another, and say, 'I agree to buy your estate;' but the person to whom he has made this offer must say, 'I agree to sell you the estate,' or he must do something equivalent to an acceptance, something which satisfies the Court, either by words or conduct, that the offer has been accepted to the knowledge of the person who made the offer."

*Sahlgreen & Carrall's Case*⁵ is to the same effect. There, where there had been a contract to accept shares on allotment of shares, and the allotment had been made but not communicated, Lord Cairns, L. J., observes: ⁶ "But to complete this appropriation, to make it binding upon *Sahlgreen & Carrall*, to make them equitable owners of the shares, and to entitle the company to enter them on the register, it was necessary that they should be informed of what was done, and, until notice was given to them, there was no binding appropriation which could make them owners of any shares." *Hebb's Case*, cited in argument, is to the same effect.

Upon these grounds, therefore, I am of opinion that the action is not maintainable, and that the rule to enter a verdict for the defendant must be made absolute.

In this judgment my Brother Pigott agrees.

BRAMWELL, B. In this case the material facts are, that the defendant applied to the plaintiffs to have shares in their company allotted to him; that shares accordingly were allotted to him; that the plaintiffs wrote

¹ Law Rep. 2 Ch. 527.

³ Law Rep. 3 Ch. 40.

⁵ Law Rep. 3 Ch. 323.

² Law Rep. 2 Ch. at p. 535.

⁴ Law Rep. 3 Ch. at pp. 43, 44.

⁶ Law Rep. 3 Ch. at p. 327.

and posted in due time a letter to him informing him thereof, but that the letter never reached him.

The question is, if he by these means became a shareholder and liable to pay a deposit, which by his letter of application he undertook to pay on allotment. The plaintiffs say he did, by the mere posting of the letter; the defendant says that was not enough, that he was entitled to know if his offer to become a shareholder was accepted, and that posting the letter to him is not equivalent to giving him that notice. The plaintiffs, admitting in a sense that he was entitled to know, say that posting a letter containing a notice that his offer was accepted and shares had been allotted to him was sufficient. Both parties agree that shareholdership is constituted by a contract between the company and the intending shareholder; both agree that for an offer to enter into a contract to be binding on the offerer, the person to whom it is made must give the offerer notice that he accepts it; and both agree that if the plaintiffs had not availed themselves of the post, but had sent their letter by hand and the messenger had not delivered it, there would have been no acceptance of the defendant's offer.

But the plaintiffs say that it is different in the case of the public post. Why it should be, no reason is given. If it is in this case, it must be because it is so as a general rule. That is to say, there is nothing peculiar in this case; there is nothing peculiar in applications for shares and in the acceptance of the application. To hold, therefore, that the plaintiffs are right, it seems to me that we must lay it down as a general proposition, that in cases where the post may be used, wherever a person posts a letter, he does that which is equivalent to delivering it to the person to whom it is directed. So that if an offer is made by letter, and a letter is posted accepting it, the offerer is bound. That if a man orders his broker to buy stock or shares, and hold them to the orders of the principal, and the principal posts a letter ordering the broker to sell, the broker not selling would be liable to damages, though the letter never reached him. So of a warehouseman bound to forward goods on an order from their owner; so of a notice to quit; so if a man proposed marriage, and the woman was to consult her friends and let him know, would it be enough if she wrote and posted a letter which never reached him? I put this case, not to raise a smile, but to show an extravagant consequence of such a general rule.

In all the cases I have put, it would be extremely hard to make liable the person who had never received the letter; it would be wholly unjust and unreasonable. It may be said that it would be hard to leave the sender of the letter without remedy. But there is this to be said: the sender of the letter need not use the public post. If he does, he may guard against mistake by sending two letters, or requesting an answer and sending another on non-receipt of the answer, or by taking other steps to ascertain the arrival or non-arrival of the letter, and to remedy the mischief of the latter event. But the person to whom it is addressed can do absolutely nothing; for by the hypothesis he does not know it has been sent.

When these considerations are borne in mind ; when it is remembered that it is open to the sender to adopt other means of sending ; when it is certain that if he does he is responsible for the due arrival of the letter, — it seems to me right to hold that, as a rule, the post is the agent of the sender of a letter, and that the delivery of a letter to the post, not followed by delivery by the post to the person to whom it is sent, is no delivery to the latter, and has no more effect than if the letter had been given to a hand messenger and not delivered, or had been kept in the pocket of the sender. In the absence of authority, therefore, I should hold, and confidently hold, that in this case the defendant's offer had not been accepted, and that he was not liable. Of course, if the person addressed had agreed that posting a letter should suffice, like a delivery of goods to a carrier, he would be bound. But it seems to me that, when nothing more appears than that the post may be resorted to, the mere posting should not bind the person written to ; because, in all cases, unless the contrary appears by express stipulation, the post may be resorted to. If it should be argued that convenience requires such a rule, as otherwise persons might untruly deny the receipt of letters, the answer is, that if such a rule prevailed persons would untruly assert the posting of them.

But there are many authorities that it is necessary to examine ; the first and most important is *Dunlop v. Higgins*.

The short facts of that case are, that Dunlop at Glasgow had made an offer by post to Higgins at Liverpool ; that Higgins was bound, according to the usual practice of merchants, to post his answer of acceptance on a certain day, the 30th of January ; that Higgins did on that day post an answer accepting the offer ; that in ordinary course of post that letter would reach Glasgow at 8 A. M. the 1st of February ; but that, owing to the slippery state of the roads, the train at Warrington was missed by the postman from Liverpool, and the letter was not delivered to Dunlop till the next delivery at 2 P. M. ; it was held he was bound. Now, one might say of this case, that it was on an appeal from Scotland, and perhaps not intrinsically binding on us. But it certainly was not dealt with by Lord Cottenham as a question of Scotch law. It may also be justified on this ground ; the parties by their correspondence recognize the post as a proper medium of communication ; then that must be subject to inevitable circumstances. I do not say *accidents*, because the delay was occasioned by frost. And certainly it would seem strange, that if the ordinary delivery of letters was at ten, and a frost or fog delayed the delivery till eleven, the person receiving the letter could say he was not bound. If the answer were to be sent by hand, surely it would be enough to send it by hand as fast as the state of the roads would admit. The difficulty of the case is not so much its facts as what Lord Cottenham said. He seems to me correctly represented in the head-note, — “ A contract is accepted by the posting of a letter declaring its acceptance.” He says :¹ “ Then comes the ques-

¹ 1 H. L. C. at p. 397.

tion, whether, under those circumstances, that being the usage of trade, the fact of the letter being delayed, not by the act of the party sending it, but by an accident connected with the post, the party so putting the letter in on the right day is to lose the benefit which would have belonged to him if the letter had arrived in due course." He speaks of an "accident." He further says:¹ "If a party does all that he can do, that is all that is called for. If there is a usage of trade to accept such an offer, and to forward it by means of the post, and if the party accepting the offer puts his letter into the post on the correct day, has he not done every thing he was bound to do? How can he be responsible for that over which he has no control?" . . . "It is not disputed — it is a very frequent occurrence — that a party having a bill of exchange, which he tenders for payment to the acceptor, and payment is refused, is bound to give the earliest notice to the drawer. That person may be resident many miles distant from him; if he puts a letter into the post at the right time, it has been held quite sufficient: he has done all that he is expected to do as far as he is concerned; he has put the letter into the post, and whether that letter be delivered or not is a matter quite immaterial, because for accidents happening at the post-office he is not responsible." It seems to me that the correct way to deal with these expressions is, to refer them to the subject-matter, and not to consider them as laying down such a proposition as the plaintiffs here contend for; but that, where the post may be used between two parties, it must be subject to those delays which are unavoidable.

The next case is *Duncan v. Topham*; that certainly is directly in favor of the plaintiffs as reported in the Common Bench Reports; but I doubt the accuracy of that report. The point is not mentioned in the report in the Law Journal, and in the report in 8 C. B. at p. 232, Maule, J., refers to a case of *Harvey v. Johnston*, mentioned in the report as 7 C. B. 295, but really 6 C. B. 295. That case was an action for breach of promise of marriage, and the evidence of acceptance of the offer was the plaintiff's going to the place where she was to be married; and in *Duncan v. Topham*, the plaintiff accepted the offer by sending off the goods as desired; and see per Cresswell, J., 6 C. B. at p. 304. So that it may be that the Court refused the rule, not on the ground that the posting of the letter without delivery was a sufficient acceptance of the offer, but on the ground that the sending of the goods was sufficient. Still there is the opinion of Mr. Justice Cresswell at *Nisi Prius* in support of the now plaintiff's contention. There is also the case of *Potter v. Sanders*, before Wigram, V. C., who held that a contract for the sale of an estate was made when the letter containing the acceptance of an offer was posted. It arrived; and he says that the vendor, by posting, did an act which, unless interrupted, concluded the contract between himself and the plaintiff. But, as I have observed, the letter did arrive, and the sender was bound by it, and necessarily bound from its date, and could not, therefore, after he had sent it and before its

¹ 1 H. L. C. at p. 398.

arrival, make a contract for the sale of the same land with a third person. Perhaps this case, therefore, does not prove much. There are also two cases before Lord Romilly: *Finucane's Case* and *Hebb's Case*. In the former, he held that posting a letter of allotment which had not been received was not sufficient. It is true that there had been laches in the company, but Lord Romilly does not seem, as far as can be guessed by the short note, to have decided the case on that ground. In the latter case, he says: ¹ “*Dunlop v. Higgins* decides that the posting of a letter accepting an offer constitutes a binding contract; but the reason of that is, that the post-office is the common agent of both parties.” He certainly seems, therefore, to understand that case in the sense the plaintiffs here contend for.

As to the cases where it had been held that notice of dishonor is duly given if the letter is posted, one may say that is a positive mercantile rule peculiar to such cases. Alderson, B., says, in *Stocken v. Collin*: ² “If the doctrine that the post-office is only the agent for the delivery of the notice were correct, no one could safely avail himself of that mode of transmission.”

Still these cases are rather in favor of the plaintiffs than otherwise. *Adams v. Lindsell* seems to have nothing to do with the question. A misdirected letter was considered as rightly delivered on the day it was delivered in fact, so as to enable the receiver to act on it. The practice, also, that, in proving a letter, the posting only is shown, may be relied on. But that is because it must be presumed, till the contrary is shown, that a public establishment such as the post-office has done its duty.

On this review of the authorities, they cannot be said to be conclusive either way. I am left, therefore, at liberty to act on my own judgment; and as I entertain a strong opinion in favor of the defendant on principle, and the Lord Chief Baron and my Brother Pigott are of opinion in favor of the defendant, I think we ought to make the rule absolute to enter a verdict for him.

Rule absolute.

IN RE IMPERIAL LAND COMPANY OF MARSEILLES.

HARRIS'S CASE.

IN CHANCERY, MAY 3, 1872.

[*Reported in Law Reports, 7 Chancery Appeals, 587.*]

IN February, 1866, the prospectus of a company in London, called the Imperial Land Company of Marseilles, Limited, was published, requiring applicants for shares to pay 1*l.* per share on application and 4*l.* on allotment, and stating that interest at the rate of 10 per cent

¹ Law Rep. 4 Eq. at p. 12.

² 7 M. & W. at p. 516.

per annum would, during the construction of the works, be paid to the shareholders.

Mr. Lewis Harris, of Dublin, filled up a letter of application for shares as follows:—

To the Directors of the Imperial Land Company of Marseilles, Limited.

Gentlemen,— Having paid to your credit with the National Bank the sum of 200*l.*, being the deposit of 1*l.* per share on 200 shares in the above company, I request that you will allot me 200 shares of 20*l.* each in the Imperial Land Company of Marseilles, Limited, and I hereby undertake to accept the same, or any smaller number which you may allot to me, and to pay the balance, 19*l.* per share, thereon; and I agree to become a member of the company, and request you to place my name on the register of members, in respect of the shares allotted to me.

I am, Gentlemen,

Your obedient servant,

Name in full: Lewis Harris.

Address in full: 19 Suffolk Street, Dublin

Profession: Bill broker.

Usual signature: L. Harris.

Date: 5th March, 1866.

This letter was sent by Mr. Harris to the directors through a bank, and was duly received. The directors appointed a committee to allot the shares, and 100 shares were allotted to Mr. Harris. A letter from the secretary of the company, containing notice of this allotment, addressed to Mr. Harris at his Dublin address, was put into the post-office at Lombard Street. There was some dispute as to the exact time of posting, but the letter was posted either on the 15th or very early in the morning of the 16th of March, 1866, and was received by Mr. Harris at Dublin on the 17th. This letter, after stating that the directors had allotted to Mr. Harris 100 shares in the company, on which a balance of 300*l.* was payable to the bankers of the company not later than the 21st of March, 1866, proceeded thus:—

As the interest warrants attached to the shares bear interest from the 21st of March, 1866, punctual payment of the above balance is requisite. The bankers are instructed not to receive payments after that day without charging interest at 10 per cent per annum.

On the 16th of March, Mr. Harris had written, and put into the post at Dublin, the following letter addressed to the directors in London, declining to accept shares in the company:—

Gentlemen,— On the 5th of March instant I paid to your credit into the National Bank, Dublin, 200*l.*, being a deposit of 1*l.* per share on an application for 200 shares in the above company. I hereby give you notice that, inasmuch as up to this date I have received no allotment, I hereby withdraw the aforesaid application, and request you will forthwith return me my deposit of 200*l.*, as I shall not accept any shares now allotted, or hold myself in any way liable.

The secretary of the company answered on the 17th of March that it was too late to withdraw the application for shares; and Mr. Harris's name was placed on the register of members as holding 100 shares. Mr. Harris, however, by his solicitors, continued to deny that he was a shareholder, and much correspondence passed on the subject.

An order was made for winding up the company, and Mr. Harris, and two other persons in a similar position, on the 23d of July, 1869, took out a summons to have their names removed from the list of contributories.

The Vice-Chancellor, Malins, dismissed the summons, and Mr. Harris appealed.

Mr. *Cole*, Q.C., and Mr. *Everitt*, for the appellant. We say that the contract to take shares was not binding until the letter allotting them was received. *British and American Telegraph Company v. Colson*; *Townsend's Case*¹; *Hebb's Case*. No doubt there have been cases where a contract has been held complete when the letter accepting an offer has been posted; but these were all mercantile cases, in which the law is necessarily different. Until the letter has reached its destination, the acceptance may be retracted. *Dunlop v. Higgins*.

Moreover, the letter of allotment is not a simple acceptance, but introduces a condition as to interest, which is a new term. *Oriental Inland Steam Company v. Briggs*;² *English and Foreign Credit Company v. Arduin*.³

Another objection is, that the allotment is void as being made by a committee instead of by the directors, in direct contravention of the seventh clause of the articles.

Mr. *Glasse*, Q. C., and Mr. *Higgins*, Q. C., for the liquidators, were not called upon.

SIR W. M. JAMES, L.J. I feel no doubt whatever as to the propriety of the judgment of the Vice-Chancellor in this case.

Three grounds have been taken on behalf of the appellant. One is, that upon the construction of the articles of association the allotment was invalid, because it was made by a committee of the directors. But the articles have in terms provided that the directors might delegate any thing to a committee; and that they did delegate this duty to this committee appears in evidence before us. It was a proper and reasonable mode of dealing with such a thing as the investigation of the applications for shares and the allotment of them. It appears to me, therefore, that there is nothing in that ground of appeal.

The second ground is that on which the greater part of the argument has been addressed to us; that there was a letter posted in Dublin recalling the application for shares before the letter posted in London containing the notice of the allotment was received in Dublin; the letter of revocation not being, in the course of post, capable of arriving in London before the letter of allotment was actually posted by the company.

¹ Law Rep. 13 Eq. 148.

² 4 D. F. & J. 191.

³ Law Rep. 5 H. L. 64.

Now it appears to me that the Vice-Chancellor's decision is correct, and that the contract was completed the moment the notice of allotment was committed to the post, addressed to the address in Dublin which Mr. Harris himself had given. That decision seems to me to be entirely in accordance with a great number of cases in this Court, and to be utterly undistinguishable, in principle or in fact, from *Dunlop v. Higgins*, a case which is binding upon us, and in which every principle argued before us was discussed at length by the Lord Chancellor in giving judgment. He arrived at the conclusion that the posting of the letter of acceptance is the completion of the contract; that is to say, the moment one man has made an offer, and the other has done something binding himself to that offer, then the contract is complete, and neither party can afterwards escape from it. That is in fact the decision in *Hebb's Case*, though in that particular case a distinction was taken by the Master of the Rolls that the company chose to send the letter to their own agent, which agent had not been authorized by the applicant to receive it on his behalf.

Against this current of authority there is the case of *British and American Telegraph Company v. Colson*, in which the Court of Exchequer — not disputing the authority of the previous decisions, because, of course, they could not dispute the authority of a case in the House of Lords — established a distinction which does not apply to this case at all. The Court there held that, although the posting of the letter, if the letter arrives, is a complete contract, yet if from any cause, such as a failure of duty by the post-office, the letter never arrives at all, then there is a difference.

It seems to me not necessary to express any opinion as to whether that distinction is sound or not, but that was the ground upon which the judges proceeded in that case. In this case the letter did arrive, and, having arrived, the contract was complete, and could not be revoked, from the time when the letter was posted. It was completed in exactly the way which the appellant desired, that is to say, he gave his address in Dublin, and the company, according to the ordinary usage of mankind in those matters, returned their answer through the post. That is a complete contract. It does not signify what was the particular hour of arrival of the one letter or the other, or which was the first, the delivery in London or the delivery in Dublin. That appears to me wholly immaterial, because the contract was completed at the time when the letter of allotment was properly posted by the company.

The other point raised was, that there was a condition annexed to this allotment letter, and on this point the case of *English and Foreign Credit Company v. Arduin*¹ was cited. Now the facts in that case were such as persons might differ about, and the Exchequer Chamber held one way, while the House of Lords held another way. But the principle upon which they all proceeded, which is the only thing we have to deal with, was, that where there is an acceptance of an offer, if there is

¹ Law Rep. 5 H. L. 64.

to be a term or condition imposed, it must be clearly so stated; otherwise it is to be considered simply as a notification which may have such effect as it ought to have in a court of law. Here the acceptance was unqualified. [His Lordship read the letter of allotment.] It appears to me that the statement as to interest does not introduce a new stipulation. It is not that the allottee is to have the shares provided that he undertakes to pay 10 per cent, but it is that he ought to pay exactly on the 21st of March, 1866, and that, by way of indulgence, the directors have told the bankers that if the allottee subsequently pays the same rate of interest which he would be entitled to receive, then they are authorized to receive payment, but not otherwise. It is a mere notification, not intended to be a new stipulation, and it never was considered by the appellant, or by anybody who received such a letter, as a new term introduced. It would be contrary to the usage of all mankind to treat this as being the introduction of a new term, altering or affecting the express acceptance of the application for shares.

I am of opinion, therefore, that the order of the Vice-Chancellor is right; that on all the grounds this appeal has failed, and must be dismissed with costs.

SIR G. MELLISH, L.J. I am of the same opinion, and I agree with what the Lord Justice has said on the first and the last grounds, and also on the second ground. The only part of the case upon which I wish to add any observations is on the second ground, which raises a question of very great general importance, and that is this: When a person in one part of the country writes to a person in another part of the country a letter containing an offer, and either directly or impliedly tells him to send his answer by post, and an answer accepting that offer is returned by post, when is a complete contract made? Is it made at the time when the letter accepting the offer is put into the post, or is it not made until that letter is received? It was contended before us that it is not made until the letter is received; so that until it is received the contract may be revoked by the person who has made the offer.

Now throughout the argument I have been forcibly struck with the extraordinary and very mischievous consequences which would follow if it were held that an offer might be revoked at any time until the letter accepting it had been actually received. No mercantile man who has received a letter making him an offer, and has accepted the offer, could safely act on that acceptance, after he has put it into the post, until he knew that it had been received. Every day, I presume, there must be a large number of mercantile letters received which require to be acted upon immediately. A person, for instance, sends an order to a merchant in London, offering to pay a certain price for so many goods. The merchant writes an answer accepting the offer, and goes that instant into the market and purchases the goods, in order to enable him to fulfil the contract. But, according to the argument presented to us, if the person who has sent the offer finds that the market is falling, and

that it will be a bad bargain for him, he may at any time, before he has received the answer, revoke his offer. The consequences might be very serious to the merchant, and might be much more serious when the parties are in distant countries. Suppose that a dealer in Liverpool writes to a dealer in New York, and offers to buy so many quarters of corn or so many bales of cotton at a certain price, and the dealer in New York, finding that he can make a favorable bargain, writes an answer accepting the offer. Then, according to the argument that has been presented to us to-day, during the whole time that the letter accepting the offer is on the Atlantic, the dealer who is to receive it in Liverpool, if he finds that the market has fallen, may send a message by telegraph and revoke his offer.

Nor is there any difference between an offer to receive shares and an offer to buy or sell goods. And yet, if the argument is sound, then for nearly ten days the buyer might wait and speculate whether the shares were rising or falling, and if he found they were falling he might revoke his offer. Those consequences are very extraordinary, and I always understood the law to be the other way until the case of *British and American Telegraph Company v. Colson*, which has caused some doubt on the subject.

I will shortly refer to the previous cases on the subject. The first case is *Adams v. Lindsell*. No doubt there were two points in that case. An offer was sent by post, but the letter was misdirected through the mistake of the party who sent it, and therefore did not arrive until two days afterwards. And that point was disposed of during the argument, that inasmuch as it was the fault of the party sending it, the answer having been written and posted as soon as it did arrive, no advantage could be taken of the delay caused by the misdirection. But the person who sent the offer, finding no answer had arrived, sold the goods before the answer had arrived, and then it was argued that, until the answer was actually received, there could be no binding contract between the parties, and therefore no breach of it. But the Court of King's Bench said that if the law was so, "no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it; and so it might go on *ad infinitum*." That appears to me to be at any rate an expression of opinion on the part of the court there, that when an offer is made by letter, and is accepted by a letter which is posted, then there is a binding contract between the parties from the time when the letter is posted.

In *Dunlop v. Higgins*, the question was directly raised whether the law was truly expounded in the case of *Adams v. Lindsell*, and the House of Lords approved of the ruling in that case. The Lord Chancellor Cottenham said, in the course of his judgment, that in the case of a bill of exchange, notice of dishonor given by putting a letter into

the post at the right time had been held quite sufficient, whether that letter was delivered or not; and he referred to *Stocken v. Collin*¹ as an authority on that point, he being clearly of opinion that the rule as to accepting a contract was exactly the same as the rule as to sending notice of dishonor of a bill of exchange. He then referred to the case of *Adams v. Lindsell*, and quoted the observation of Lord Ellenborough. That case therefore appears to me to be a direct decision that the contract is made from the time when it is accepted by post.

There is then the case of *Duncan v. Topham*,² in which there were no doubt several questions, on one of which, whether posting the acceptance was sufficient, Mr. Justice Cresswell told the jury that if the letter accepting the contract was put into the post-office, and lost by the negligence of the post-office authorities, the contract would nevertheless be complete. There was then a motion for a new trial, and though Mr. Baron Bramwell, in *British and American Telegraph Company v. Colson*, has said that he thought the case not properly reported, still it appears as if Mr. Justice Maule and Chief Justice Wilde both assented to the ruling of Mr. Justice Cresswell, and refused the rule on that point.

In addition to that, there is the case of *Potter v. Sanders*, which is also a direct decision of a Court of Equity on the point.

Against them there is simply this case of *British and American Telegraph Company v. Colson*, and that is not a direct decision on this point. The Lord Chief Baron, in the course of his judgment, says, it may be that if the letter arrives in time, then the contract will be treated as having been made from the time when the letter was put into the post; but I do not see how there can be any relation back in a case of this kind, as there may be in bankruptcy. If the contract, after the letter has arrived in time, is to be treated as having been made from the time the letter is posted, the reason is that the contract was actually made at the time when the letter was posted. Still that case is not a direct decision on the point before us, though I confess I have great difficulty in reconciling it with the previous decision in *Dunlop v. Higgins*. That case was commented on at considerable length both by the Lord Chief Baron and by Baron Bramwell, but they only commented on the facts of the case, and showed — which I think they did show — that, according to the facts of the case, the plaintiff might very well have had a verdict, even if the rule of law had been that the contract was not made until the letter arrived, because there the only thing which prevented the arrival of the letter was the bad weather, which made the mail very late. And therefore I agree, upon the facts of that case, that the plaintiff might have recovered, even although the law was that the contract was not made until the letter arrived. But then the real question before the House of Lords in *Dunlop v. Higgins* was, whether the ruling of the Lord Justice General was correct in point of law, and the House of Lords held that it was correct.

However, I agree with the Lord Justice that it is not necessary to

¹ 7 M. & W. 515.

² 8 C. B. 225.

give any decisive opinion on the point, because, although the contract is complete at the time when the letter accepting the offer is posted, yet it may be subject to a condition subsequent that, if the letter does not arrive in due course of post, then the parties may act on the assumption that the offer has not been accepted. That, however, is not the case before us; the letter did arrive in due time; and the question is whether, under that state of circumstances, the parties are bound by the contract.

DICKINSON v. DODDS. ✓

IN THE HIGH COURT OF JUSTICE, JANUARY 25, 26, 1876.

IN THE COURT OF APPEAL, MARCH 31, APRIL 1, 1876.

[*Reported in 2 Chancery Division, 463.*]

ON Wednesday, the 10th of June, 1874, the defendant John Dodds signed and delivered to the plaintiff, George Dickinson, a memorandum, of which the material part was as follows:—

I hereby agree to sell to Mr. George Dickinson the whole of the dwelling-houses, garden ground, stabling, and outbuildings thereto belonging, situate at Croft, belonging to me, for the sum of 800*l.* As witness my hand this tenth day of June, 1874.

800*l.*

(Signed)

JOHN DODDS.

P.S.—This offer to be left over until Friday, 9 o'clock, A.M. J. D. (the twelfth), 12th June, 1874.

(Signed)

J. DODDS.

The bill alleged that Dodds understood and intended that the plaintiff should have until Friday, 9 A.M., within which to determine whether he would or would not purchase, and that he should absolutely have, until that time, the refusal of the property at the price of 800*l.*, and that the plaintiff in fact determined to accept the offer on the morning of Thursday, the 11th of June, but did not at once signify his acceptance to Dodds, believing that he had the power to accept it until 9 A.M. on the Friday.

In the afternoon of the Thursday the plaintiff was informed by a Mr. Berry that Dodds had been offering or agreeing to sell the property to Thomas Allan, the other defendant. Thereupon the plaintiff, at about half-past seven in the evening, went to the house of Mrs. Burgess, the mother-in-law of Dodds, where he was then staying, and left with her a formal acceptance, in writing, of the offer to sell the property. According to the evidence of Mrs. Burgess, this document never in fact reached Dodds, she having forgotten to give it to him.

On the following (Friday) morning, at about seven o'clock, Berry, who was acting as agent for Dickinson, found Dodds at the Darlington

railway station, and handed to him a duplicate of the acceptance by Dickinson, and explained to Dodds its purport. He replied that it was too late, as he had sold the property. A few minutes later Dickinson himself found Dodds entering a railway carriage, and handed him another duplicate of the notice of acceptance, but Dodds declined to receive it, saying, "You are too late. I have sold the property."

It appeared that on the day before, Thursday, the 11th of June, Dodds had signed a formal contract for the sale of the property to the defendant Allan for 800*l.*, and had received from him a deposit of 40*l.*

The bill in this suit prayed that the defendant Dodds might be decreed specifically to perform the contract of the 10th of June, 1874; that he might be restrained from conveying the property to Allan; that Allan might be restrained from taking any such conveyance; that, if any such conveyance had been or should be made, Allan might be declared a trustee of the property for, and might be directed to convey the property to, the plaintiff; and for damages.

The cause came on for hearing before Vice-Chancellor Bacon on the 25th of January, 1876.

Kay, Q.C., and *Caldecott*, for the plaintiff. The memorandum of the 10th of June, 1874, being in writing, satisfies the Statute of Frauds. Though signed by the vendor only, it is effectual as an agreement to sell the property.

Supposing it to have been an offer only, an offer, if accepted before it is withdrawn, becomes, upon acceptance, a binding agreement. Even if signed by the person only who is sought to be charged, a proposal, if accepted by the other party, is within the statute. *Reuss v. Picksley*,¹ following *Warner v. Willington*.²

In *Kennedy v. Lee*,³ Lord Eldon states the law to be, that "if a person communicates his acceptance of an offer within a reasonable time after the offer being made, and if, within a reasonable time of the acceptance being communicated, no variation has been made by either party in the terms of the offer so made and accepted, the acceptance must be taken as simultaneous with the offer, and both together as constituting such an agreement as the Court will execute." So that not only is a parol acceptance sufficient, but such an acceptance relates back to the date of the offer. This is further shown by *Adams v. Lindsell*, where an offer of sale was made by letter to the plaintiffs "on receiving their answer in course of post." The letter was misdirected, and did not reach the plaintiffs until two days after it ought to have reached them. The plaintiffs, immediately on receiving the letter, wrote an answer accepting; and it was held that they were entitled to the benefit of the contract.

The ruling in *Adams v. Lindsell* was approved by the House of Lords in *Dunlop v. Higgins*, as appears from the judgment of Sir G.

¹ Law Rep. 1 Ex. 342.

² 3 Drew. 523.

³ 3 Mer. 441, 454.

Mellish, L.J., in Harris's Case; and it is now settled that a contract which can be accepted by letter is complete when a letter containing such acceptance has been posted. The leaving, by the plaintiff, of the notice at Dodds's residence was equivalent to the delivery of a letter by a postman.

That Allan is a necessary party appears from Potter v. Sanders, and if Allan has had a conveyance of the legal estate, the Court will decree specific performance against him.

Swanston, Q.C., and *Crossley*, for the defendant Dodds. The bill puts the case no higher than that of an offer. Taking the memorandum of the 10th of June, 1874, as an offer only, it is well established that, until acceptance, either party may retract. *Cooke v. Oxley*; *Benjamin on Sales*.¹

After Dodds had retracted by selling to Allan, the offer was no longer open. Having an option to retract, he exercised that option. *Humphries v. Carvalho*; ² *Pollock on Contracts*; ³ *Routledge v. Grant*.

In delivering judgment in *Martin v. Mitchell*,⁴ Sir T. Plumer, M. R., put the case of a contract signed by one party only. He asked,⁵ "What mutuality is there, if the one is at liberty to renounce the contract, and the other not?" and in *Meynell v. Surtees*,⁶ the distinctions between an offer and an agreement in respect of binding land were pointed out. *Fry on Specific Performance*.⁷

The postscript being merely voluntary, without consideration, is *nudum pactum*; and the memorandum may be read as if it contained no postscript.

Jackson, Q.C., and *Gazdar*, for the defendant Allan. Allan is an unnecessary party. If Dodds has not made a valid contract with the plaintiff, he is a trustee for Allan; if Dodds has made a binding contract, rights arise between Allan and Dodds which are not now in controversy.

We agree with the co-defendant that, in order that the plaintiff may have a *locus standi*, there must have been a contract. If the postscript is a modification of the offer, it is *nudum pactum*, and may be rejected.

It may be conceded that, if there had been an acceptance, it would have related back, in point of date, to the offer. But there was no acceptance. Notice of acceptance served on Mrs. Burgess was not enough.

Even if it would have been otherwise sufficient, here it was too late. Dodds had no property left to contract for. The property had ceased to be his. He had retracted his offer; and the property had become vested in some one else. *Hebb's Case*.

The plaintiff would not have delivered the notice if he had not heard

¹ 2d Ed. p. 52.

² 16 East, 45.

³ Page 8.

⁴ 2 Jac. & W. 413.

⁵ Page 428.

⁶ 1 Jur. (N. S.) 737.

⁷ Page 80.

of the negotiation between Dodds and Allan. What retraction could be more effectual than the sale of the property to some one else?

The defendant Allan was a *bona fide* purchaser without notice.

Kay, in reply. The true meaning of the document was a sale. The expression is not "open," but "over." The only liberty to be allowed by that was a liberty for the plaintiff to retract.

But, taking it as an offer, the meaning was that, at any day or hour within the interval named, the plaintiff had a right to indicate to the defendant his acceptance, and from that moment the defendant would have had no right of retraction. Then, was there a retraction before acceptance? To be a retraction, there must be a notification to the other party. A pure resolve within the recesses of the vendor's own mind is not sufficient. There was no communication to the plaintiff. He accepted on two several occasions. There could have been no parting with the property without communication with him. He was told that the offer was to be left over.

The grounds of the decision in *Cooke v. Oxley* have been abundantly explained by Mr. Benjamin in his work on Sales. It was decided simply on a point of pleading.

BACON, V.C., after remarking that the case involved no question of unfairness or inequality, and after stating the terms of the document of the 10th of June, 1874, and the statement of the defendant's case as given in his answer, continued:—

I consider that to be one agreement, and I think the terms of the agreement put an end to any question of *nudum pactum*. I think the inducement for the plaintiff to enter into the contract was the defendant's compliance with the plaintiff's request that there should be some time allowed to him to determine whether he would accept it or not. But, whether the letter is read with or without the postscript, it is, in my judgment, as plain and clear a contract for sale as can be expressed in words, one of the terms of that contract being that the plaintiff shall not be called upon to accept, or to testify his acceptance, until 9 o'clock on the morning of the twelfth of June. I see, therefore, no reason why the Court should not enforce the specific performance of the contract, if it finds that all the conditions have been complied with.

Then what are the facts? It is clear that a plain, explicit acceptance of the contract was, on Thursday, the 11th of June, delivered by the plaintiff at the place of abode of the defendant, and ought to have come to his hands. Whether it came to his hands or not, the fact remains that, within the time limited, the plaintiff did accept and testify his acceptance. From that moment the plaintiff was bound, and the defendant could at any time, notwithstanding Allan, have filed a bill against the plaintiff for the specific performance of the contract which he had entered into, and which the defendant had accepted.

I am at a loss to guess upon what ground it can be said that it is not a contract which the Court will enforce. It cannot be on the

ground that the defendant had entered into a contract with Allan, because, giving to the defendant all the latitude which can be desired, admitting that he had the same time to change his mind as he, by the agreement, gave to the plaintiff, the law, I take it, is clear, on the authorities, that if a contract, unilateral in its shape, is completed by the acceptance of the party on the other side, it becomes a perfectly valid and binding contract. It may be withdrawn from by one of the parties in the mean time, but, in order to be withdrawn from, information of that fact must be conveyed to the mind of the person who is to be affected by it. It will not do for the defendant to say, "I made up my mind that I would withdraw, but I did not tell the plaintiff; I did not say any thing to the plaintiff until after he had told me by a written notice and with a loud voice that he accepted the option which had been left to him by the agreement." In my opinion, after that hour on Friday, earlier than nine o'clock, when the plaintiff and defendant met, if not before, the contract was completed, and neither party could retire from it.

It is said that the authorities justify the defendant's contention that he is not bound to perform this agreement, and the case of *Cooke v. Oxley* was referred to. But I find that the judgment in *Cooke v. Oxley* went solely upon the pleadings. It was a rule to show cause why judgment should not be arrested; therefore it must have been upon the pleadings. Now, the pleadings were that the vendor in that case proposed to sell to the plaintiff. There was no suggestion of any agreement which could be enforced. The defendant proposed to the plaintiff to sell and deliver, if the plaintiff would agree to purchase upon the terms offered, and give notice at an earlier hour than four of the afternoon of that day; and the plaintiff says he agreed to purchase, but does not say the defendant agreed to sell. He agreed to purchase, and gave notice before four o'clock in the afternoon. Although the case is not so clearly and satisfactorily reported as might be desired, it is only necessary to read the judgment to see that it proceeds solely upon this allegation in the pleadings. Mr. Justice *Buller* says, "As to the subsequent time, the promise can only be supported upon the ground of a new contract made at four o'clock; but there was no pretence for that." Nor was there the slightest allegation in the pleadings for that; and judgment was given against the plaintiff.

Routledge v. Grant is plainly distinguishable from this case upon the grounds which have been mentioned. There the contract was to sell on certain terms; possession to be given upon a particular day. Those terms were varied, and therefore no agreement was come to; and when the intended purchaser was willing to relinquish the condition which he imposed, the other said, "No, I withdraw; I have made up my mind not to sell to you;" and the judgment of the court was that he was perfectly right.

Then *Warner v. Willington*¹ seems to point out the law in the

¹ 3 Drew. 523.

clearest and most distinct manner possible. An offer was made — call it an agreement or offer, it is quite indifferent. It was so far an offer that it was not to be binding unless there was an acceptance, and before acceptance was made, the offer was retracted, the agreement was rescinded, and the person who had then the character of vendor declined to go further with the arrangement, which had been begun by what had passed between them. In the present case I read the agreement as a positive engagement, on the part of the defendant Dodds, that he will sell for 800*l.*, and not a promise, but an agreement, part of the same instrument, that the plaintiff shall not be called upon to express his acquiescence in that agreement until Friday at nine o'clock. Before Friday at nine o'clock the defendant receives notice of acceptance. Upon what ground can the defendant now be let off his contract? It is said that Allan can sustain his agreement with the defendant, because at the time when they entered into the contract the defendant was possessed of the property, and the plaintiff had nothing to do with it. But it would be opening the door to fraud of the most flagrant description if it was permitted to a defendant, the owner of property, to enter into a binding contract to sell, and then sell it to somebody else and say that by the fact of such second sale he has deprived himself of the property which he has agreed to sell by the first contract. That is what Allan says in substance, for he says that the sale to him was a retraction which deprived Dodds of the equitable interest he had in the property, although the legal estate remained in him. But, by the fact of the agreement, and by the relation back of the acceptance (for such I must hold to be the law) to the date of the agreement, the property in equity was the property of the plaintiff, and Dodds had nothing to sell to Allan. The property remained intact, unaffected by any contract with Allan, and there is no ground, in my opinion, for the contention that the contract with Allan can be supported. It would be doing violence to principles perfectly well known and often acted upon in this court. I think the plaintiff has made out very satisfactorily his title to a decree for specific performance, both as having the equitable interest, which he asserts is vested in him, and as being a purchaser of the property for valuable consideration without notice against both Dodds, the vendor, and Allan, who has entered into the contract with him.

There will be a decree for specific performance, with a declaration that Allan has no interest in the property; and the plaintiff will be at liberty to deduct his costs of the suit out of his purchase-money.

From this decision both the defendants appealed, and the appeals were heard on the 31st of March and the 1st of April, 1876.

Swanston, Q.C. (*Crossley* with him), for the defendant Dodds.

Sir H. Jackson, Q.C. (*Gazdar* with him), for the defendant Allan.

Kay, Q.C., and *Caldecott*, for the plaintiff.

The arguments amounted to a repetition of those before the Vice-Chancellor. In addition to the authorities then cited, the following

cases were referred to: *Thornbury v. Beville*; ¹ *Taylor v. Wakefield*; ² *Head v. Diggon*; *Palmer v. Scott*.³

JAMES, L.J., after referring to the document of the 10th of June, 1874, continued:—

The document, though beginning “I hereby agree to sell,” was nothing but an offer, and was only intended to be an offer, for the plaintiff himself tells us that he required time to consider whether he would enter into an agreement or not. Unless both parties had then agreed, there was no concluded agreement then made; it was in effect and substance only an offer to sell. The plaintiff, being minded not to complete the bargain at that time, added this memorandum: “This offer to be left over until Friday, 9 o’clock A.M., 12th June, 1874.” That shows it was only an offer. There was no consideration given for the undertaking or promise, to whatever extent it may be considered binding, to keep the property unsold until 9 o’clock on Friday morning; but apparently Dickinson was of opinion, and probably Dodds was of the same opinion, that he (Dodds) was bound by that promise, and could not in any way withdraw from it, or retract it, until 9 o’clock on Friday morning, and this probably explains a good deal of what afterwards took place. But it is clear settled law, on one of the clearest principles of law, that this promise, being a mere *nudum pactum*, was not binding, and that at any moment before a complete acceptance by Dickinson of the offer, Dodds was as free as Dickinson himself. Well, that being the state of things, it is said that the only mode in which Dodds could assert that freedom was by actually and distinctly saying to Dickinson, “Now I withdraw my offer.” It appears to me that there is neither principle nor authority for the proposition that there must be an express and actual withdrawal of the offer, or what is called a retraction. It must, to constitute a contract, appear that the two minds were at one at the same moment of time; that is, that there was an offer continuing up to the time of the acceptance. If there was not such a continuing offer, then the acceptance comes to nothing. Of course it may well be that the one man is bound in some way or other to let the other man know that his mind with regard to the offer has been changed; but in this case, beyond all question, the plaintiff knew that Dodds was no longer minded to sell the property to him as plainly and clearly as if Dodds had told him in so many words, “I withdraw the offer.” This is evident from the plaintiff’s own statements in the bill.

The plaintiff says in effect that, having heard and knowing that Dodds was no longer minded to sell to him, and that he was selling or had sold to some one else, thinking that he could not, in point of law, withdraw his offer, meaning to fix him to it, and endeavoring to bind him, “I went to the house where he was lodging, and saw his mother-in-law, and left with her an acceptance of the offer, knowing

¹ 1 Y. & C. Ch. 554.

² 6 E. & B. 765.

³ 1 Russ. & My. 391.

all the while that he had entirely changed his mind. I got an agent to watch for him at 7 o'clock the next morning, and I went to the train just before 9 o'clock, in order that I might catch him and give him my notice of acceptance just before 9 o'clock, and when that occurred he told my agent, and he told me, you are too late, and he then threw back the paper." It is to my mind quite clear that, before there was any attempt at acceptance by the plaintiff, he was perfectly well aware that Dodds had changed his mind, and that he had in fact agreed to sell the property to Allan. It is impossible, therefore, to say there was ever that existence of the same mind between the two parties which is essential in point of law to the making of an agreement. I am of opinion, therefore, that the plaintiff has failed to prove that there was any binding contract between Dodds and himself.

MELLISH, L.J. I am of the same opinion. The first question is, whether this document of the 10th of June, 1874, which was signed by Dodds, was an agreement to sell, or only an offer to sell, the property therein mentioned to Dickinson; and I am clearly of opinion that it was only an offer, although it is in the first part of it, independently of the postscript, worded as an agreement. I apprehend that, until acceptance, so that both parties are bound, even though an instrument is so worded as to express that both parties agree, it is in point of law only an offer, and, until both parties are bound, neither party is bound. It is not necessary that both parties should be bound within the Statute of Frauds, for, if one party makes an offer in writing, and the other accepts it verbally, that will be sufficient to bind the person who has signed the written document. But, if there be no agreement, either verbally or in writing, then, until acceptance, it is in point of law an offer only, although worded as if it were an agreement. But it is hardly necessary to resort to that doctrine in the present case, because the postscript calls it an offer, and says, "This offer to be left over until Friday, 9 o'clock A.M." Well, then, this being only an offer, the law says — and it is a perfectly clear rule of law — that, although it is said that the offer is to be left over until Friday morning at 9 o'clock, that did not bind Dodds. He was not in point of law bound to hold the offer over until 9 o'clock on Friday morning. He was not so bound either in law or in equity. Well, that being so, when, on the next day, he made an agreement with Allan to sell the property to him, I am not aware of any ground on which it can be said that that contract with Allan was not as good and binding a contract as ever was made. Assuming Allan to have known (there is some dispute about it, and Allan does not admit that he knew of it, but I will assume that he did) that Dodds had made the offer to Dickinson, and had given him till Friday morning at 9 o'clock to accept it, still, in point of law, that could not prevent Allan from making a more favorable offer than Dickinson, and entering at once into a binding agreement with Dodds.

Then Dickinson is informed by Berry that the property has been sold by Dodds to Allan. Berry does not tell us from whom he heard

it, but he says that he did hear it, that he knew it, and that he informed Dickinson of it. Now, stopping there, the question which arises is this: If an offer has been made for the sale of property, and, before that offer is accepted, the person who has made the offer enters into a binding agreement to sell the property to somebody else, and the person to whom the offer was first made receives notice in some way that the property has been sold to another person, can he after that make a binding contract by the acceptance of the offer? I am of opinion that he cannot. The law may be right or wrong in saying that a person who has given to another a certain time within which to accept an offer is not bound by his promise to give that time; but, if he is not bound by that promise, and may still sell the property to some one else, and if it be the law that, in order to make a contract, the two minds must be in agreement at some one time, that is, at the time of the acceptance, how is it possible that when the person to whom the offer has been made knows that the person who has made the offer has sold the property to some one else, and that, in fact, he has not remained in the same mind to sell it to him, he can be at liberty to accept the offer and thereby make a binding contract? It seems to me that would be simply absurd. If a man makes an offer to sell a particular horse in his stable, and says, "I will give you until the day after to-morrow to accept the offer," and the next day goes and sells the horse to somebody else, and receives the purchase-money from him, can the person to whom the offer was originally made then come and say, "I accept," so as to make a binding contract, and so as to be entitled to recover damages for the non-delivery of the horse? If the rule of law is that a mere offer to sell property, which can be withdrawn at any time, and which is made dependent on the acceptance of the person to whom it is made, is a mere *nudum pactum*, how is it possible that the person to whom the offer has been made can, by acceptance, make a binding contract after he knows that the person who has made the offer has sold the property to some one else? It is admitted law that, if a man who makes an offer dies, the offer cannot be accepted after he is dead, and parting with the property has very much the same effect as the death of the owner, for it makes the performance of the offer impossible. I am clearly of opinion that, just as, when a man who has made an offer dies before it is accepted, it is impossible that it can then be accepted, so when once the person to whom the offer was made knows that the property has been sold to some one else, it is too late for him to accept the offer, and on that ground I am clearly of opinion that there was no binding contract for the sale of this property by Dodds to Dickinson, and even if there had been, it seems to me that the sale of the property to Allan was first in point of time. However, it is not necessary to consider, if there had been two binding contracts, which of them would be entitled to priority in equity, because there is no binding contract between Dodds and Dickinson.

BAGGALLAY, J.A. I entirely concur in the judgments which have been pronounced.

JAMES, L.J. The bill will be dismissed with costs.

Swanston, Q.C. We shall have the costs of the appeal.

Kay, Q.C. There should only be the costs of one appeal.

Sir *H. Jackson*, Q.C. The defendant Allan was obliged to protect himself.

MELLISH, L.J. He had a separate case. There might, if two contracts had been proved, have been a question of priority.

JAMES, L.J. I think the plaintiff must pay the costs of both appeals.

ELIASON *ET AL.* *v.* HENSHAW. ✓

SUPREME COURT OF THE UNITED STATES, FEB. 17, 20, 1819.

[*Reported in 4 Wheaton, 225, 4 Curtis, 382.*]

ERROR to the Circuit Court for the District of Columbia.

Jones and Key, for the plaintiff in error.

Swann, for the defendant in error.

WASHINGTON, J., delivered the opinion of the Court.

This is an action, brought by the defendant in error, to recover damages for the non-performance of an agreement, alleged to have been entered into by the plaintiffs in error, for the purchase of a quantity of flour at a stipulated price. The evidence of this contract, given in the court below, is stated in a bill of exceptions, and is to the following effect: A letter from the plaintiffs to the defendant, dated the 10th of February, 1813, in which they say: "Captain Conn informs us that you have a quantity of flour to dispose of. We are in the practice of purchasing flour at all times in Georgetown, and will be glad to serve you, either in receiving your flour in store when the markets are dull, and disposing of it when the markets will answer to advantage, or we will purchase at market price when delivered; if you are disposed to engage two or three hundred barrels at present, we will give you \$9.50 per barrel, deliverable the first water in Georgetown, or any service we can. If you should want an advance, please write us by mail, and will send you part of the money in advance." In a postscript they add: "Please write by return of wagon whether you accept our offer." This letter was sent from the house at which the writer then was, about two miles from Harper's Ferry, to the defendant at his mill, at Mill Creek, distant about twenty miles from Harper's Ferry, by a wagoner then employed by the defendant to haul flour from his mill to Harper's Ferry, and then about to return home with his wagon. He delivered the letter to the defendant on the 14th of the same

month, to which an answer, dated the succeeding day, was written by the defendant, addressed to the plaintiffs at Georgetown, and despatched by a mail which left Mill Creek on the 19th, being the first regular mail from that place to Georgetown. In this letter the writer says: "Your favor of the 10th instant was handed me by Mr. Chenoweth last evening. I take the earliest opportunity to answer it by post. Your proposal to engage 300 barrels of flour, delivered in Georgetown by the first water, at \$9.50 per barrel, I accept, and shall send on the flour by the first boats that pass down from where my flour is stored on the river; as to any advance, will be unnecessary, — payment on delivery is all that is required."

On the 25th of the same month, the plaintiffs addressed to the defendant an answer to the above, dated at Georgetown, in which they acknowledge the receipt of it, and add: "Not having heard from you before, had quite given over the expectation of getting your flour, more particularly as we requested an answer by return of wagon the next day, and as we did not get it, had bought all we wanted."

The wagoner, by whom the plaintiffs' first letter was sent, informed them, when he received it, that he should not probably return to Harper's Ferry, and he did not in fact return in the defendant's employ. The flour was sent down to Georgetown some time in March, and the delivery of it to the plaintiffs was regularly tendered and refused.

Upon this evidence, the defendants in the Court below, the plaintiffs in error, moved that Court to instruct the jury, that, if they believed the said evidence to be true as stated, the plaintiff in this action was not entitled to recover the amount of the price of the 300 barrels of flour, at the rate of \$9.50 per barrel. The Court being divided in opinion, the instruction prayed for was not given.

The question is, whether the court below ought to have given the instruction to the jury, as the same was prayed for. If they ought, the judgment, which was in favor of the plaintiff in that court, must be reversed.

It is an undeniable principle of the law of contracts, that an offer of a bargain by one person to another imposes no obligation upon the former, until it is accepted by the latter according to the terms in which the offer was made. Any qualification of or departure from those terms invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation upon either.

In this case, the plaintiffs in error offered to purchase from the defendant two or three hundred barrels of flour, to be delivered at Georgetown by the first water, and to pay for the same \$9.50 per barrel. To the letter containing this offer they required an answer by the return of the wagon by which the letter was despatched. This wagon was at that time in the service of the defendant, and employed by him in hauling flour from his mill to Harper's Ferry, near to which

place the plaintiffs then were. The meaning of the writers was obvious. They could easily calculate, by the usual length of time which was employed by this wagon in travelling from Harper's Ferry to Mill Creek, and back again with a load of flour, about what time they should receive the desired answer; and, therefore, it was entirely unimportant whether it was sent by that or another wagon, or in any other manner, provided it was sent to Harper's Ferry, and was not delayed beyond the time which was ordinarily employed by wagons engaged in hauling flour from the defendant's mill to Harper's Ferry. Whatever uncertainty there might have been as to the time when the answer would be received, there was none as to the place to which it was to be sent; this was distinctly indicated by the mode pointed out for the conveyance of the answer. The place, therefore, to which the answer was to be sent constituted an essential part of the plaintiffs' offer.

It appears, however, from the bill of exceptions, that no answer to this letter was at any time sent to the plaintiffs at Harper's Ferry. Their offer, it is true, was accepted by the terms of a letter addressed Georgetown, and received by the plaintiffs at that place; but an acceptance communicated at a place different from that pointed out by the plaintiffs, and forming a part of their proposal, imposed no obligation binding upon them, unless they had acquiesced in it, which they declined doing.

It is no argument that an answer was received at Georgetown; the plaintiffs in error had a right to dictate the terms upon which they would purchase the flour; and, unless they were complied with, they were not bound by them. All their arrangements may have been made with a view to the circumstance of place, and they were the only judges of its importance. There was, therefore, no contract concluded between these parties; and the Court ought, therefore, to have given the instruction to the jury which was asked for.

Judgment reversed. Cause remanded, with directions to award a *venire facias de novo*.

M'CULLOCH v. THE EAGLE INSURANCE COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCT. TERM, 1822.

[Reported in 1 Pickering, 278.]

THIS action, which was assumpsit, came before the Court upon a case stated. The material facts were as follows. On the 29th of December, 1820, the plaintiff, who lived at Kennebunk, in Maine, wrote to the defendants, requesting to know on what terms they would insure \$2500 on his brig "Hesper" and cargo from Martinico to the United

States. The defendants, on the 1st of January, 1821, sent an answer, saying they would take the risk at two and a half per cent. This letter was received by the plaintiff on the 3d of January, on which day he wrote a reply, requesting the defendants to fill a policy on the terms proposed by them. The defendants on the 2d of January wrote again to the plaintiff, declining to take the risk, but the plaintiff had sent his letter of the 3d before he received the last letter of the defendants. All the letters were sent by mail, and were duly received by the parties respectively. The vessel was afterwards lost on the voyage.

The only question in the cause was, whether the correspondence of the parties constituted a contract by which the defendants were bound.

Prescott, for the plaintiff. It is important to have a contract for insurance take effect immediately. When the terms are agreed on, and a minute of them is made on the books of an insurance company, they consider both parties holden, in case a loss or arrival should happen before the policy is made out. The letter of the 1st of January was an engagement which was binding on the defendants until the plaintiff should express his refusal to accept their offer. It resembles a *pollicitation* in the civil law, which from the first is obligatory on the party making it, and, upon the assent of the person to whom it is made, becomes binding on both parties. The letter of the 3d of January was an assent on the part of the plaintiff, which was not defeated by the defendants' letter of the 2d. If this letter of the 2d had reached the plaintiff before his letter of the 3d had been written and put into the post-office, it might have been a revocation of the defendants' offer. It would resemble a stopping *in transitu*. If the defendants had carried their first letter to the plaintiff, and he had told them to fill a policy, the contract would have been complete. So if they had employed an agent at Kennebunk for that purpose, and the plaintiff had said the same thing to the agent. The putting the plaintiff's letter of the 3d into the post-office was a delivery to the defendants. [WILDE, J. If so, why was not the putting of the defendants' letter of the 2d into the post-office a delivery to the plaintiff?'] The countermand could be

¹ "In all engagements *inter absentes*, when the negotiations are carried on by letters or messages, an offer by one party, until it is made known to the other, is but an intention not expressed, *propositum in mente retentum*. If the messenger or letter can be overtaken before it arrives at its destination, it may be revoked; but if the revocation does not arrive until after the offer is received *and accepted*, and especially not until it has been acted upon, then it is too late. For the revocation is but a simple act of the will, a *propositum*, not *res gesta*, an act done, until after it is known, and of course can have no more effect than an intention not expressed, but confined within the breast of the party. It is a remark of one of the most profound jurists of the last age, that an act of the will not known is in jurisprudence as if it did not exist. *Une volonté qui n'est pas connue est en jurisprudence comme si elle n'existait pas.* 6 Toull. Droit Civil, No. 29. . . . At the same time it is freely admitted that this is a question of general jurisprudence of no little intricacy, and that it is not easy to determine by any universal and inflexible rule when engagements entered into by letters or messengers, between persons residing at a distance from each other, become irrevocably binding on both parties. The question was pretty fully considered by the Court of King's

of no avail until it was received. It was not necessary that the defendants should have immediate notice of the plaintiff's assent. Their promise was binding or not, as the plaintiff should please. After the letter of the 3d was put into the post-office, the defendants would have had a remedy for the premium. Suppose that a merchant in Baltimore writes to one here, offering to sell him bank-shares at a certain price, and the merchant here immediately answers that he will take them; this is a contract as soon as the answer is put into the post-office; and if the Baltimore merchant, the next day after sending his first letter, should write that stocks had risen, and decline selling, it would not avail him.

Saltonstall, for the defendants. The letter of the 29th of December was merely an inquiry. It was nothing like a proposition. No answer to it would have made a contract. The defendants made an offer on the 1st of January, which was retracted on the 2d before it was accepted. Both parties assented to it at different times, but never together; so that there was never a mutual assent. When was the contract made? Not before the 3d, and at that time the offer was retracted. *Eliason v. Henshaw*, 4 Wheat. 228. One party is not bound until the other has had a reasonable time to give his assent. Both should be bound, or both have leave to retract. *Cooke v. Oxley*, 3 D. & E. 653, is a strong case to this effect. There is no case where one party is bound and the other not, except it be so expressed in the terms of the contract; as in the sale of a horse, with liberty to the purchaser to return it if he is not satisfied with it. When was the plaintiff bound? When he put his letter into the post-office? If he could have procured insurance to be made at Kennebunk, might he not have stopped the letter? It was not sufficient that an assent was in the mind of the plaintiff; it should have been made known to the other party. The case supposed respecting bank-shares is this same case.

Prescott, in reply. Suppose an agent of the defendants had carried the letter of the 1st of January, and had delivered it on the 3d, and

Bench, in the case of *Adams v. Lindsell*, 1 Barn. & Ald. 681, and the decision was in conformity with the principle that I have adopted. But I infer from the reasoning of Best, C. J., in the case of *Routledge v. Grant*, 4 Bing. 653, that this decision was not entirely satisfactory to the Court of Common Pleas, or at least it receives but a qualified approval. The same general question was presented to the Supreme Court of Massachusetts, in *M'Culloch v. The Eagle Ins. Co.*, 1 Pick. 278, and to the Court of Errors in New York, in *Mactier v. Frith*, 6 Wend. 103, and these courts came to opposite conclusions. It has been found not free from difficulties by the civilians, and perhaps it will not be found an easy task to reconcile all their opinions. The subject has been examined by Pothier, *Contrat de Vente*, No. 32; by Toullier, *Droit Civil*, Vol. 6, No. 30, 31, and notes; Vol. 7, No. 321, and notes; and it was discussed by Merlin in a very elaborate argument before the Court of Cassation, with his usual logical acuteness and copiousness of learning. *Répertoire de Jurisprudence, Vente*, § 1, art. 3, No. 11, *bis*. To the general rule that has been stated there is one well-established exception. If the party who makes the offer dies or becomes insane before it is received and accepted, the offer is then a nullity, though accepted before the death is known." *Ware, J., The Palo Alto, Davis*, 343, 357. — Ed.

the plaintiff had told him that he accepted the offer. The letter of the 2d would have been on the way as now; but there would have been a good contract. In the case supposed, of procuring insurance at Kennebunk, the plaintiff could not have stopped his letter after it was put into the post-office. If the defendants could prove his saying that he assented, it would have given them a right of action against him. The letter was merely notice of his assent.

PARKER, C. J., delivered the opinion of the Court. This action is brought to recover a sum alleged to have been insured by the defendants on the brig *Hesper*, belonging to the plaintiff, on a voyage from Martinico to her port of discharge, and another sum on her cargo. The usual evidence of such contract, a policy, never having been made, the only question submitted is, whether there was an agreement to insure; every thing else necessary to entitle the plaintiff to recover being agreed by the parties. And it is certain that, if a contract was made, the mere want of a policy will not prevent the plaintiff from recovering.

We are to inquire then, whether the correspondence between the parties which is submitted to us, does constitute a contract binding upon both parties; if it does not, whatever might be the expectations of either, it is only an attempt to make a contract, which has failed. The letter from the plaintiff, of the 29th of December, contained an inquiry only, as to the rate of premium at which the insurance might be done in the defendant's office, and the plaintiff was entirely at liberty to accept or refuse the terms which were proposed in answer; even if he had made no reply to the defendant's letter, there would have been neither a breach of contract nor of civility. This answer was written on the 1st of January, and would reach the post-office in Kennebunk, the place of the plaintiff's residence, on the 3d. It was replied to on the day of the arrival by an acceptance of the terms, and a direction to make out the policy and deliver it to the plaintiff's agent in Boston, who was authorized to give a promissory note for the premium in common form. But on the 2d of January, before the defendants' letter to the plaintiff could have been received, another letter was written by the defendants, retracting the offer made in the former letter, and signifying a determination not to insure upon that vessel upon any terms. These letters crossed each other upon the road. It is contended by the plaintiff, that the bargain was complete at the moment he wrote and put into the mail his letter signifying his acceptance of the terms offered; by the defendants, that the treaty was open until they should have received that letter, and that in the mean time they had a right to withdraw their offer. We adopt the latter opinion as the most reasonable. The offer did not bind the plaintiff until it was accepted; and it could not be accepted, to the knowledge of the defendants, until the letter announcing the acceptance was received, or at most until the regular time for its arrival by mail had elapsed. Had the vessel arrived in safety at Kennebunk on the 2d or on the morning of the 3d, the plaintiff would not have accepted the offer, and was not

bound to accept; so that the defendants would not have been entitled to any premium, and both must be bound in order to make the contract binding upon either, unless time is given by one to the other, in which case perhaps he may be bound, although the other is not; at least we should think this reasonable in mercantile contracts, though it was decided otherwise in the case of *Cooke v. Oxley*, 3 D. & E. 653. In that case the declaration stated that the defendant proposed to the plaintiff to sell him tobacco at a certain price, and, at the request of the plaintiff, gave him until four o'clock P. M. to consent or disagree to the proposal. The plaintiff averred, that he did agree to purchase, and gave notice thereof to the defendant before four o'clock; that he offered to pay the price, and requested the defendant to deliver the tobacco, which he refused. The Court, without hearing the counsel for the defendant, said that it was an engagement all on one side, and was therefore *nudum pactum*; and Buller, J., said there was neither damage to the plaintiff nor advantage to the defendant, at the time when the contract was first made. The judgment was affirmed in the Exchequer Chamber. This was treated by the plaintiff's counsel as an actual sale upon condition, to avoid the Statute of Frauds; so that the real question in that case was, whether there was a bargain in fact amounting to a sale, as the question here is, whether there was an insurance in fact, the usual evidence of which only was left unfinished; and it is as necessary that the obligation should be mutual in this case as in that. See also *Payne v. Cave*, 3 D. & E. 148. It is suggested that the putting the letter into the mail was a completion of the bargain; but if the vessel had arrived, and the plaintiff had recalled his letter, or if he had sent on an express to announce his refusal to accept before the letter arrived, we think he would not have been held to pay the premium.

No authority has been cited on the side of the plaintiff to support his case, and we cannot perceive upon general principles any ground upon which he can recover. There seems to have been *locus pœnitentiæ* for both parties, no change of circumstances having occurred, nor any information being received, until the loss of the vessel was known, which was nearly three months after the correspondence ceased between the parties; during all which time the plaintiff might have got insured elsewhere if the risk was a fair one. Had the vessel arrived after the defendants' letter was received, and before it was answered, there can be no doubt the plaintiff might have declined entering into the bargain, because he then had made no contract; and so long as it continued open for the plaintiff, it must have been open for the defendants, and their revocation was made before the plaintiff had opportunity to accept.

It was suggested in the argument that the correspondence between these parties formed what is called in the civil law a *pollicitation*, a sort of contract which arises from a promise made by one party only, without any consent or acceptance by the other; but this is a peculiar kind of obligation, which exists only from an individual towards a body politic or government. Heinecc. sec. Ord. Pandect. Part 7, §§ 334, 335.

In a note to the first of these sections the author says, "For although promises made otherwise always require the consent and acceptance of the other party, yet here" (that is, in promises made to the State) "the law itself accepts the promise for the State." *Plaintiff nonsuit.*

MACTIER'S ADMINISTRATORS, *Appellants*, and FRITH,
Respondent.

NEW YORK COURT OF ERRORS, DECEMBER, 1830.

[*Reported in 6 Wendell, 103.*]

APPEAL from Chancery. At New York, in the autumn of 1822, the respondent and Henry Mactier, the intestate, agreed to embark in a commercial adventure, in which they were to be jointly and equally interested. Frith was to direct a shipment of 200 pipes of brandy from France to New York, to be consigned to Mactier, who was to ship to the respondent at Jacmel, in St. Domingo, provisions to the amount of the invoice cost of the brandy, and the respondent was to place the shippers of the brandy in funds by shipments of coffee to France, in French vessels, and the parties were to share equally in the result of the speculation all around.

In pursuance of this arrangement, Frith, on the 5th September, 1822, wrote Firebrace, Davidson, & Co., a mercantile house at Havre, to ship 200 pipes of brandy to New York to the consignment of Mactier. On the 24th December, Frith, who had returned to Jacmel, where he did business as a merchant, wrote a letter to Mactier on a variety of subjects, in which was contained a paragraph in these words: "I also have the pleasure of handing you copies of Messrs. Firebrace, Davidson, & Co.'s letters regarding the brandy order. By-the-bye, as your brother, before I left New York, declined taking the interest I offered him in this speculation, and wishing to confine myself in business as much as possible, so as to bring my concerns to a certain focus, *I would propose to you to take the adventure solely to your own account*, holding the value to cover the transaction to my account in New York." On the 17th January, 1823, Mactier wrote to Frith, acknowledging the receipt of his letter of the 24th ult. ; thanks him for sending the copy of Firebrace, Davidson, & Co.'s letter on the subject of the brandy order ; says that he has received a letter from them, informing that the brandy would be shipped and leave Bordeaux about the 1st of December then past ; and adds, "This has been from the first a favorite speculation with me, and am pleased to say it still promises a favorable result ; but to render it complete, I am desirous the speculation should go forward in the way first proposed, thereby making it a treble operation. As you

have, however, expressed a wish that I should take the adventure to my own account, *I shall delay coming to any determination till I again hear from you.* The prospect of war between France and Spain may defeat the object of this speculation, as far as relates to the shipment of provisions hence to Hayti, to be invested in coffee for France, *in which case I will at once decide to take the adventure to my own account.* Our London accounts, down to the 5th of December, speak confidently of a war between France and Spain, — a measure which, if carried into effect, would operate to *your disadvantage.*” Also, “The next arrival from Europe will probably decide the question of peace or war, and I will lose no time in communicating the same to you;” and also, “Let what will happen, I trust you will in no way be a sufferer.” On the 7th March, 1823, Frith wrote Mactier, making no other allusion to the last letter of Mactier than the following: “I have received your esteemed favors of the 17th and 31st January, *and note their respective contents.*” On the twelfth day of March, 1823, the ship La Claire arrived at New York, laden with the brandy in question, and was at the wharf on the morning of the 13th of March. A clerk of Mactier testified that he had a conversation with Mactier about the time the brandy arrived, perhaps the morning after, and Mactier then said *he should take it to himself.* A merchant of New York also testified that Mactier consulted with him on the subject of some brandy which he expected to arrive; there was some offer for his taking it on his own account, and he appeared inclined to take it. From the state of things, he advised Mactier to take it, and there was a letter drafted by Mactier upon the subject, in which the merchant made some alterations. The letter stated that he, Mactier, should take the brandy to his own account. On the 17th of March, Mactier entered the brandy at the custom-house *as owner*, and not as consignee, took the usual oath, and gave a bond for the duties. On the twenty-second day of March, he sold 150 pipes of the brandy on the wharf to several commercial houses, and took their notes for the price of the same. The remaining 50 pipes were put in the public store, and remained there in bond, the liquidated duties not having been secured to be paid by Mactier. On the twenty-fifth day of March, Mactier wrote a letter directed to Frith at Jacmel, in which he said: “I have now to advise the arrival of French ship La Claire with the 200 pipes of brandy, and that in consequence of the probability of war between France and Spain, and in compliance with the wish expressed in your regarded favor of the 24th December, and my answer thereto of the 17th January last, *I have decided to take this adventure to my own account.* I therefore credit you with the amount of the invoice,” amounting to \$14,254⁵⁷/₁₀₀. To this letter was attached a postscript, dated the 31st of March. On the twenty-eighth day of March, Frith wrote a letter to Mactier, dated at Jacmel, in which, speaking of the brandy in question, he says: “With regard to this adventure, I would wish to confirm, if altogether satisfactory to you, what I mentioned to you some time ago, and which I omitted

to repeat to you in my previous letter, in reply to yours of the 17th of January. I find the more one does in this country, in the present state of trade, the more one's affairs get shackled." Previous to the arrival of these two last letters at their respective places of direction, Mactier was dead, he having departed this life on the 10th of April, 1823. On the 21st of April, Frith again wrote a letter addressed to Mactier, in which he acknowledges the receipt of his letter of the 25th of March, says he has noted its contents, and requests Mactier to charter on his account a stanch, first-class vessel, and send out to Jacmel by her 400 barrels of flour, 150 barrels of pork, 150 barrels of beef, 100 barrels of mackerel, &c., &c. In the mean time, however, Mactier having died, administration of his goods, &c., was granted to A. N. Lawrence and another, who, in May, 1823, gave the requisite bonds to secure the duties on the 50 pipes of brandy which had not been bonded for by Mactier in his lifetime, except by the general bond on entering the goods at the custom-house, and took the 50 pipes from the public store and sold them at public auction.

The respondent, unwilling to come in as a general creditor of Mactier and receive a *pro rata* distribution, on the 1st of April, 1824, filed his bill in the Court of Chancery, alleging that the brandy was shipped from France on his sole account, and that Mactier was only the consignee thereof. The respondent in his bill admits that he proposed to Mactier to become the purchaser of the brandy, but avers that, after the receipt of his letter of the 17th January, he considered him as having declined his proposal, and that no other offer was subsequently made by the respondent. He sets forth a letter written to him by Mactier, on the thirteenth day of March, 1823, in which, speaking of the brandy ordered from France, he says: "I am looking daily for its arrival; it is to be regretted the order was not more promptly executed, as the delay I fear will operate to *our* disadvantage. We have London dates to the 30th January; war between France and Spain may now be considered inevitable; France has recalled her minister, and 100,000 Frenchmen have been ordered to march into Spain." He alleges that the letter of Mactier to him, of the 25th March, was not received until several days after the death of Mactier, and that his letter to Mactier of the 21st April was written in ignorance of the death of Mactier, and that he did not intend thereby, and he conceives he did not finally consummate, the sale as claimed. He avers that the promissory notes, received by Mactier from the purchasers of the 150 pipes of brandy, remained in Mactier's possession at the time of his death, not discounted or passed away; and that the same came into possession of, and were at maturity collected by, the defendants; that the defendants, by wrongfully and collusively representing themselves as entitled to the 50 pipes of brandy remaining in the public store, obtained possession of and sold the same; and that on the 2d July, 1823, he, by his attorney, claimed of the defendants the part of the shipment or invoice of brandy which remained unsold at the decease of Mactier; and also demanded

the proceeds of that part of the invoice sold by Mactier, existing in notes or otherwise, and the proceeds of the part sold by the defendants. The bill concludes by praying an account of the sales of the brandy, and a decree directing the defendants to retain in their hands sufficient of the funds belonging to the estate of Mactier to pay and satisfy the respondent when his accounts shall be settled and adjudged upon by the Court.

The defendants put in their answer, insisting that the brandy, on its arrival at the port of New York, was the sole and exclusive property of Mactier; and that the portion thereof which came to their hands at his decease, and the proceeds of that part thereof which was sold by him in his lifetime, and which came to their hands, rightfully belonged to his estate, and was subject to be disposed of in a due course of administration. The defendants admit that they have in their hands \$13,935 belonging to the estate of Mactier, after the payment of certain debts to the United States, and various other sums of money which they were directed to pay, have credit for the payment of, and are authorized to retain, by virtue of a decree of the Court of Chancery of the 14th June, 1823, in a cause wherein A. Mactier, senior, in behalf of himself and the creditors of Henry Mactier, deceased, is complainant, and themselves defendants; and they contend that such decree is in full force, and that by virtue thereof they are bound to pay the above-mentioned sum of money and such as may come to their hands *pro rata* or equally among all the creditors of Henry Mactier, pursuant to such decree.

By the answer it was admitted that the defendants had found among the papers of Henry Mactier two invoices of the 200 pipes of brandy, similar in all respects, except that one states the shipment to have been made "to the address and for the account of Henry Mactier," and the other states it to have been made "for the account of the complainant to the address of Henry Mactier." The first of the invoices was used upon entering the brandy at the custom-house. It also appeared in evidence that on the first day of March, 1823, Mactier effected an insurance on *commissions* arising on a consignment from Bordeaux to New York, to the amount of \$1500. In a petty cash-book of Mactier's there is the following entry: "1823, March 17, John A. Frith's sales of brandy, paid entry at custom-house, eighty cents." The clerk of Mactier, who made this entry, testified that the name of Frith, prefixed to the entry in the petty cash-book, does not necessarily prove that the brandy was Frith's, but it shows that he at that time supposed the brandy to be Frith's; if it had then belonged to Mactier, or if Mactier had decided to take it, and any entry in the books had been made showing that fact, he would have entered it, "Sales of brandy Dr. for entering," &c. At the time of making the entry, he considered the fact of ownership contingent. Mactier afterwards directed the account to be opened in the books, charging the brandy to himself, the account to be "Sales of brandy." An entry was made in the day-

book, of the twenty-eighth day of March, crediting Frith with the invoice amount of the brandy. Entries, he said, are sometimes made several days after the transaction; then the entry refers back to the true date of the transaction, mentioning the time. The entry was made by the thirty-first day of March. He also testified that the letter of the 13th of March, mentioned in the complainant's bill, was copied on the night of that day, but he had no recollection when it left the office; it possibly might not have gone until the La Claire arrived.

On the 20th May, 1825, Chancellor Sanford made an order of reference to a master to examine witnesses, and to report whether, in his opinion, the complainant was the owner of any part, and what part, of the shipment of brandy at the time of the sale of the same, or of any part thereof; and if so, whether, as such owner, he had a *lien*, by virtue of such ownership, on the brandy, or the proceeds thereof, in the hands of the defendants; and that if the master should be of the opinion that he was entitled as a special creditor, or had a *lien*, that then he should take and state an account, and report the amount due the complainant as such special creditor, or having a *lien*. Under this order witnesses were examined, and a mass of documentary evidence produced before the master, who, on the 10th October, 1825, reported that the complainant was not the owner of the shipment of brandy, neither at the time of the sale of the part thereof made by Mactier in his lifetime, or of the other part thereof made by the defendants as his administrators since his death, and had no *lien* on the brandy, or on the proceeds thereof in the hands of the administrators. To this report the complainant excepted, and the cause was heard upon the exceptions before Chancellor Walworth, who, in March, 1829, allowed the exception to that part of the master's report above stated (other exceptions to other parts of the report, which it has not been deemed essential to state, were disallowed), and decreed that the report be referred back to the master to alter and correct the same, and to take and state an account, and report the amount due the complainant, on the principle that he, as *survivor*, is entitled to the net proceeds of the adventure of brandy, so far as they can be traced and identified, and has a specific *lien* on the net proceeds of the 50 pipes of brandy sold by the administrators, and on the proceeds of the notes given for the 150 pipes which remained uncollected or not passed away at the time of Mactier's death, or on so much as is necessary to satisfy the balance due complainant for payment and disbursements on account of that adventure, after deducting from those proceeds the balance of the amount paid for duties and expenses, if any, over and above the amount of proceeds of the shipment of brandy which were received by Mactier in his lifetime. From this decree the defendants appealed. For the reasons of the Chancellor for the decree pronounced by him, see 1 Paige, 434. The cause was argued here by

S. Boyd and *S. A. Talcott*, for the appellants.

S. Stevens and *G. Griffin*, for the respondent.

The following opinions were delivered :—

By MR. JUSTICE MARCY. The object of the bill filed in this case is to obtain from the administrators of Mactier the proceeds of the 50 pipes of brandy which came to their possession after his death, and the amount of such notes taken on the sale of the 150 pipes on the 22d of March, 1823, as were uncollected and undisposed of at the death of Mactier, or at least so much thereof as may be necessary to pay the balance due the respondent for disbursements on account of the adventure. The question on which the decision in this case, as I apprehend, mainly depends, relates to the alleged sale of the brandy to Mactier. There are many definitions of what constitutes a contract, but all of them are of course substantially alike. Powell states a contract to be a transaction in which each party comes under an obligation to the other, and each reciprocally acquires a right to what is promised by the other. Powell on Cont. 4. In testing the validity of contracts many things are to be considered. The contract that the appellants set up in this case is alleged by the respondent to be deficient in several essential requisites. When that was done which, on the assumption of there being parties capable of contracting, was necessary, as the respondent contends, to complete it, Mactier was dead. If the contract was only in progress of execution, and there remained but a single act to be done to complete it, his death rendered the performance of that act impossible; it suspended the proceedings at the very point where they were when it occurred.

The doctrine of relation was discussed on the argument, and its application urged on us. It was insisted that if nothing but a formal act was to be done, and it was done by the surviving party after the death of the other, and in ignorance of it, this act might be adjudged to relate to a period antecedent to the death of the party dying. If, as it was held in the Court below, the bargain in this case could not be closed until Frith received Mactier's letter accepting his offer to sell, the receiving that letter, it was said, might be considered as having relation to the time when it was sent, upon the principle that courts often resort to this doctrine of relation to prevent an injury resulting to a party from the act of God. Where an agent without competent authority makes a contract, a subsequent ratification by the principal relates back to the time when the agent acted. The ratification is equivalent to an original authority; it is considered in law as furnishing proof of an authority in the agent at the time he assumed to have it. If, however, he had disclosed his want of authority, but had settled the terms of the contract, in the belief that what he did would be ratified, the doctrine of relation would not apply; the bargain would take effect from the time of the ratification. The reason for the distinction which I apprehend to exist in the two cases is, that in the one acts are done which make a perfect contract, provided the actors had the authority they assumed to have; and the ratification of their acts by those from whom their power must have been derived, if they had it,

is legal evidence that they did have it when they acted. In the other case, the fact being made known that there was not competent power in one of the actors, the very foundation on which alone the presumption of authority can rest, is destroyed. A presumption will not be called in to supply an impossibility. In a contract of sale all agree that there must be two minds, at least, concurring at the moment of its completion; but this cannot be if there be but one contracting party in existence. There is also, as I conceive, a difference between acts essential to perfect an agreement, and those which relate to the forms prescribed in certain instances as modes of proof. This difference is illustrated by those cases which were referred to on the argument concerning the enrolment of deeds. The enrolment is a formal act, but necessary to be done, to enable the party to prove the bargain and sale; but when it is done, it relates to the time when the indenture was executed. It is, as Lord Bacon calls it, but a perfective ceremony of the first deed of bargain and sale. *Regula* 14. So, where chancery decrees the execution of a parol contract on the ground of part performance, the title certainly, as between the parties, vests from the time of the contract, and not from the performance of those acts that remove the bar created by the Statute of Frauds. The doctrine of relation may be permitted to operate on these *formal acts*, but it cannot be used, as it is proposed to use it here, to supply a *party* to a contract who does not exist at the time when the act is done which fixes to it the seal of validity; or, what is the same thing, it cannot carry back that act to a time when parties capable of contracting did in fact exist. This view of the subject is conformable to the civil law as well as the law of France. By these laws, the death of the party offering to sell is held to be a revocation of the offer, and an acceptance subsequent to that event is ineffectual to close the bargain. Pothier, *Traité du Contrat de Vente*, p. 1, § 2, art. 3, No. 32. My conclusion, in regard to this objection to the alleged contract, is, that if any act was required to be done, even by Frith, to complete the sale when Mactier died, that act could not be subsequently performed.

I am now to consider whether there was a contract before Mactier's death, which had the consent of the contracting parties so given and made known as to be binding on them. That a consent is necessary, all agree; but what shall constitute it in a given case may admit of much diversity of opinion. The consent of the parties in a contract of sale, as explained by Pothier, consists in the concurrence of the will of the vendor to sell a particular thing to the purchaser for a specified price, with the will of the purchaser to buy the same thing for that price. Pothier, *Traité du Contrat de Vente*, p. 1, § 2, art. 3, No. 31. Delvincourt, another eminent French writer on the Civil Code of France, says that, although it is impossible that there should be a contract without the consent of all parties, it is not indispensable that the wills of the parties should concur at the same instant, provided the will of the one that did not concur at first is declared before the will of the

other is revoked. 5 *Cours de Code Civil*, 93. Although the will of the party making the offer may precede that of the party accepting, yet it must continue down to the time of the acceptance. Where parties are together chaffering about an article of merchandise, and one expresses a present willingness to accept of certain terms, that willingness is supposed to continue, unless it is revoked, to the close of their interview and negotiation on the same subject; and if, during this time, the other party says he will take the article on the terms proposed, the bargain is thereby closed. Pothier, *Traité du Contrat de Vente*, p. 1, § 2, art. 3, No. 31. What I mean by its being closed is, that nothing mutual between the parties remains to be done to give to either a right to have it carried into effect; either can enforce it against the other, or recover damages for the non-fulfilment of it; but if there be conditions expressed or implied to be performed by the purchaser, he cannot compel the delivery until they are performed. If the price is to be immediately paid or security given, he cannot have the property until payment is made, or security given, or a tender thereof. Touchstone, 204, 5; Noy's Max., chap. 42; 2 Blackstone's Comm. 447.

Where the negotiation between the contracting parties, residing at a distance from each other, is conducted, as it usually is, by letters, it is necessary, in order that their minds may meet, that the will of the party making the proposition to sell should continue until his letter shall have reached the other, and he shall have signified, or at least had an opportunity to signify, his acceptance of the proposition. This Pothier holds to be the legal presumption, unless the contrary appears. His language is: *Cette volonté est présumé tant qu'il ne paraît rien de contraire*. This doctrine, which presumes the continuance of a willingness to contract after it has been manifested by an offer, is not confined to the civil law and the codes of those nations which have constructed their systems with the materials drawn from that exhaustless store-house of jurisprudence; it is found in the common law; indeed, it exists of necessity wherever the power to contract exists in parties separated from each other. The rule of the common law is, that wherever the existence of a particular subject-matter or relation has been once proved, its continuance is presumed till proof be given to the contrary, or till a different presumption be afforded by the nature of the subject-matter. 16 East, 55; Stark. Ev. 1252. The case of *Adams v. Lindsell*, 1 Barn. & Ald. 681, proceeds upon and affirms the principle, that the willingness to contract thus manifested is presumed to continue for the time limited, and, if that be not indicated by the offer, until it is expressly revoked or countervailed by a contrary presumption. In that case it was said, "The defendants must be considered in law as making, during every instant of time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is complete by the acceptance of it by the latter." Against the authority of the case of *Adams v. Lindsell*, we have urged on us a decision of a court of the highest respectability in one of our sister States. The case of *M'Cul-*

loch v. The Eagle Ins. Co., 1 Pick. 278, conflicts in principle, according to my views of it, with the case decided by the King's Bench. I should have been pleased to see these tribunals harmonize upon a question of no small importance to the commercial world; and I have therefore deliberately weighed the ingenious attempts made to reconcile these decisions upon this point; but these attempts appear to me to have been unsuccessful. A refinement which would distinguish between a contract for insurance, and one for the sale of goods, in relation to the assent of the parties, might relieve us from the embarrassment which the different principles of these decisions is calculated to produce; but to apply such a distinction hereafter would doubtless involve courts in a still more distressing embarrassment. Distinctions which are not founded on a difference in the nature of things are not entitled to indulgence; they tend to make the science of law a collection of arbitrary rules appealing to factitious reasons for their support, consequently difficult to be acquired, and often of uncertain application. The two cases referred to should have had applied to them the same rule of law, and we are required to say what that rule is, in deciding the case now under consideration.

The principle of the decision of the King's Bench is, simply that the acceptance of an offer made through the medium of a letter binds the bargain, if the party making the offer has not revoked it, as he has a right to do before it is accepted. The rule laid down by the Supreme Court of Massachusetts regards the contract as incomplete until the party making the offer is notified of the acceptance, or until the time when he should have received it, the party accepting having done what was incumbent on him to give notice. The Chancellor, in deciding this case, gave his sanction to the latter rule: "To make a valid contract," he says, "it is not only necessary that the minds of the contracting parties should meet on the subject of the contract, but they must know that fact." The decision of the court of Massachusetts makes knowledge, by the party tendering the offer, of the other's acceptance, essential to the completion of the contract. If one party is not bound till he knows or might know, and therefore is presumed to know, that the other has accepted, the accepting party, on the same principle, ought not to be bound till he knows the offering party has not recalled the offer before knowledge of the acceptance. The principle of that case would bring the matter to the point stated by the Chancellor; viz., the parties must know that their minds meet on the subject of the contract. If a bargain can be completed between absent parties, it must be when one of them cannot know the fact whether it be or be not completed. It cannot begin to be obligatory on the one before it is on the other; there must be a precise time when the obligation attaches to both, and this time must happen when one of the parties cannot know that the obligation has attached to him; the obligation does not therefore arise from a knowledge of the present concurrence of the wills of the contracting parties. All the authorities

state a contract, or an agreement (which is the same thing), to be *aggregatio mentium*. Why should not this *meeting of the minds*, which makes the contract, also indicate the moment when it becomes obligatory? I might rather ask, is it not, and must it not be, the moment when it does become obligatory? If the party making the offer is not bound until he knows of this meeting of minds, for the same reason the party accepting the offer ought not to be bound when his acceptance is received, because he does not know of the meeting of the minds; for the offer may have been withdrawn before his acceptance was received. If more than a concurrence of minds upon a distinct proposition is required to make an obligatory contract, the definition of what constitutes a contract is not correct. Instead of being the meeting of the minds of the contracting parties, it should be a knowledge of this meeting. It was said on the argument, that if concurrence of minds alone would make a valid contract, one might be constructed out of mere volitions and uncommunicated wishes; I think such a result would not follow. The law does not regard bare volitions and pure mental abstractions. When it speaks of the operations of the mind, it means such as have been made manifest by overt acts; when it speaks of the meeting of minds, it refers to such a meeting as has been made known by proper acts; and when thus made known it is effective, although the parties who may claim the benefit of, or be bound by a contract thus made, may for a season remain ignorant of its being made.

Testing the rules of law laid down in the two cases to which I have referred by the authority of reason, and the practical results that are likely to flow from them, it does appear to me that we are not left at liberty to hesitate about the choice. If we are inclined, from the force of abstract reason, to prefer the rule laid down by the Court of King's Bench, that inclination will be greatly strengthened by a recurrence to the opinions of courts and jurists. The Common Pleas, in England, seem to me to have given their approval to the decision of *Adams v. Lindsell*, 4 Bing. 653. Judge Washington, in delivering the opinion of the Court in *Eliason v. Henshaw*, 4 Wheaton, 228, said: "Until the terms of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation on either." The inference from this proposition is, that the assent of the parties to the terms of the agreement, and not their knowledge of it, completes the contract. It was decided in the Circuit Court of the United States for Pennsylvania, that contracts are formed by the offer on the one hand, and an acceptance on the other. After acceptance the contract is obligatory on both. *Coxe's Dig.* 192. In this case, knowledge of the acceptance is not brought into view as necessary to constitute the obligation. Both the Roman law and the French civil code, as we have seen by the references already made, contain a doctrine in accordance with the principle of these cases. I think I am therefore warranted in saying that the proposition may be considered as established,

that the acceptance of a written offer of a contract of sale consummates the bargain, provided the offer is standing at the time of the acceptance.

What shall constitute an acceptance will depend in a great measure upon circumstances. The mere determination of the mind, unacted on, can never be an acceptance. Where the offer is by letter, the usual mode of acceptance is the sending of a letter announcing a consent to accept; where it is made by a messenger, a determination to accept, returned through him, or sent by another, would seem to be all the law requires, if the contract may be consummated without writing. There are other modes which are equally conclusive upon the parties: keeping silence, under certain circumstances, is an assent to a proposition; any thing that shall amount to a manifestation of a formed determination to accept, communicated or put in the proper way to be communicated to the party making the offer, would doubtless complete the contract; but a letter written would not be an acceptance, so long as it remained in the possession or under the control of the writer. An acceptance is the distinct act of one party to the contract, as much as the offer is of the other; the knowledge, by the party making the offer, of the determination of the party receiving it, is not an ingredient of an acceptance. It is not compounded of an assent by one party to the terms offered, and a knowledge of that assent by the other.

I will now apply this law to the facts of this case. Frith's offer to sell his interest in the brandy certainly continued till his letter of the 24th of December was received at New York, and Mactier had a fair opportunity to answer it. If the answer of the 17th of January had contained an unqualified acceptance, the bargain would have been closed when it was sent away for Jacmel; but the offer was not then accepted. There was a promise to accept upon a contingency; for Mactier says, after alluding to the prospect of a war between France and Spain, "in which case," that is, in case of such a war, "I will at once decide to take the adventure to my own account." This concluded nothing. If the event had actually happened, and Frith had insisted on enforcing this conditional acceptance, it would not have been in his power to do so. The most that Mactier said was, that if an expected event happened, he would do an act which would complete the bargain. The happening of the event could not, without the act, complete it. The Roman law regarded the tense of the verb used by the contracting parties to determine whether the bargain was concluded: *Verbum imperfecti temporis rem adhuc imperfectum significat*. There is a wide difference between a promise to give an assent to a proposition for a contract on the happening of a contingency, and the annunciation of a present assent to it. If the expected event happens, and the act promised is performed, the bargain is closed; but it is the promised acceptance, and not the happening of the event, that gives validity to the contract. If, in this case, the offer of Frith had been to

Mactier to take the brandy on the happening of a French and Spanish war, and Mactier had promised to decide to take it in such an event, the simple fact of his taking it after the war would have enabled Frith to treat him as the purchaser of it. Such an act would have been a valid acceptance; but a conditional acceptance of an unconditional offer, followed up by acts of the acceptor, after the condition was fulfilled on which the acceptance depended, might not be considered as completing the bargain, without the acquiescence of the party making the offer in those acts, because the minds of the parties would not have met on the precise terms of the contract.

To conclude the bargain, Mactier must have accepted the offer as tendered to him by Frith, and that acceptance must have been while the offer, in contemplation of law, was still held out to him. That there was an acceptance, or rather that Mactier did all that was incumbent on him to do to effect an acceptance was not denied; but it was insisted, on the part of the respondent, that it was made after the offer was withdrawn. It will be necessary to consider when this acceptance took place, as preparatory to settling the fact of the continuance of the offer down to that time. There is not the slightest evidence of the determination on the part of Mactier to take the brandy before the seventeenth day of March. The insurance that he effected on his commissions on the 1st of March disproves the existence of such a determination on that day; but if the situation of the parties was changed, and Frith was now endeavoring to set up the contract, I am at a loss to conceive how Mactier's representatives could withstand the force of the facts which took place on the 17th of March. In answer to the offer, Mactier delayed coming to a determination thereon, but promised to accept it if there should be a war; on the 17th of March, when that event was considered settled, he entered the brandy as his own property, and told his clerk that he had determined to take it. But if there should be any doubt as to the effect of this conduct, there can be none as to his subsequent acts. By a letter dated the 25th, with a postscript of the 31st of March, he accepts the offer. This letter was immediately transmitted to Frith, and as soon as the 28th of March entries were made in his books, showing that he had become the purchaser. Enough was done by the 31st to constitute an acceptance of Frith's offer and to complete the bargain, if the offer can be considered as standing till that day.

An offer, when once made, continues, as I have heretofore shown, to the satisfaction of my own mind at least, until it is expressly revoked, or until circumstances authorize a presumption that it is revoked. The offer itself may show very clearly when the presumption of revocation attaches. Where it is made to be replied to by return mail, the party to whom it is addressed must at once perceive that it is not to stand for an acceptance to be transmitted after the mail. If an offer stands until it is expressly withdrawn, or is presumed to be withdrawn, whether it is held out to a party at a particular period or not, is a matter of fact.

Then we are to determine, as a matter of fact, whether Frith's offer was held out for Mactier's acceptance until the 31st of March; if Frith intended it should stand so, and he viewed himself as tendering it to Mactier down to that time, we are bound to regard it as standing, unless his intention was the result of the fraudulent conduct of Mactier. The acts of Frith, after the death of Mactier, could do nothing towards completing an unfinished contract; but I think they may be fairly adverted to for the purpose of ascertaining his intentions in relation to the continuance of his offer. On the 7th of March he acknowledges Mactier's letter of the 17th of January, which did not decline, as it has been construed to do, the offer, but apprised him that it was kept under advisement; and by using the expression, "noting the contents," Frith is, I think, to be understood as yielding to the proposed delay. If a doubt as to this construction of that letter could spring up in the mind, it would be at once removed by the perusal of the letter of the 28th of the same month. In that he expresses a wish to confirm what he had said in the letter making the offer to sell, and declares that he had in a previous letter, which must mean that of the 7th, omitted to communicate the same thing. In answering Mactier's letter which contained the acceptance of his offer, he recognizes the bargain as closed, and gives directions as to investing the proceeds of the brandy. All the subsequent correspondence acquiesces in the sale. It appears to me to be impossible to say, after reading the letters of Frith written subsequent to his knowledge of Mactier's acceptance, that he did not consider the offer as held out to Mactier down to the time when it was accepted, and the bargain closed by that acceptance; and I think we must adjudge it to have been closed, unless the agreement was nugatory by reason that the thing to which it related had not an actual or potential existence when the contract was consummated.¹ . . .

Whereupon, on the question being put, Shall the decree of the Chancellor appealed from be reversed? Chief Justice SAVAGE and Justices SUTHERLAND and MARCY, and eighteen Senators, voted in the affirmative; and three Senators voted in the negative, — viz., Senators McCARTY, TODD, and WHEELER.

The decree of the Chancellor was accordingly reversed with costs.

¹ The remainder of the opinion relates to questions having no bearing upon the subject of "Mutual Consent." Concurring opinions were delivered by Senators Benton, Maynard, Oliver, and Throop; but it has not been deemed necessary to include them in this collection. — ED.

AVERILL AND ANOTHER v. HEDGE.¹

SUPREME COURT OF ERRORS OF CONNECTICUT, JUNE, 1838.

[*Reported in 12 Connecticut Reports, 424.*]

THIS was an action of assumpsit, alleging that the defendant, who conducted business at Wareham, Mass., under the name of the "Washington Iron Company," promised to deliver to the plaintiffs a quantity of rods, shapes, and band-iron, in March, 1836.

The cause was tried at Hartford, February Term, 1838, before WILLIAMS, C.J.

The plaintiffs claimed to have proved their case by a correspondence between the parties in the year 1836; particularly by a letter from the plaintiffs to the defendant, dated the 29th of February; the defendant's answer of the 2d of March; a letter from the plaintiffs, dated the 14th of March; and the answer of the defendant, also dated the 14th of March by mistake, in fact written the 16th of March; and the plaintiffs' reply thereto dated the 19th of March. The whole correspondence between the parties was read in evidence; the substance of which was as follows: —

HARTFORD, 29th February, 1836. DEAR SIR, — Regarding the future disposal of your nails as settled, it would be improper to importune you further on that point. Perhaps, however, you will not object to sending us a supply of rods and shapes for our spring sales. Please to say on what terms you will send us ten or fifteen tons, assorted, by first packet in the spring. We shall also be glad to purchase our hollow ware of you on the same terms as heretofore. Shall be pleased to hear from you soon. [Signed, "J. & H. AVERILL," the plaintiffs; and addressed to JOHN THOMAS, Esq.]

WAREHAM, 2d March, 1836. On the writer's return from the South last evening, he found your favor of the 29th ult., to which we now reply. We will deliver to you in Hartford ten or fifteen tons of rods, shapes, and band-iron, as follows: say — shapes and band-iron, at \$110 per gross ton, six months; and old sable rods, at \$116, six months. Old sable iron is now quick at \$110 per ton in Boston; and there is but very little iron there at any price. We will deliver you at Hartford a common assortment of hollow ware, at \$28 per ton, six months. [Signed "WASHINGTON IRON COMPANY, per JOHN THOMAS, Agent;" and addressed to the plaintiffs.]

HARTFORD, 14 March, 1836. DEAR SIR, — We have bought of Ripley & Averill their stock of hollow ware, with the understanding that we were to receive the benefit of their orders given you last July. The balance of this order we believe was in readiness last fall; but, owing to the early closing of our navigation, was not shipped. Will you ship us this lot of ware by first packet, on terms then agreed on with R. & A.? Please advise us by return mail if we may expect it. [Signed by plaintiffs, and addressed to JOHN THOMAS, Esq.]

WAREHAM, March 14, 1836. DEAR SIR, — Your favor of the 14th inst. is at hand, and contents noted. We shall most cheerfully comply with your request to ship to you the balance of Ripley & Averill's order of hardware, not

filled in consequence of the early frost last autumn; such being the understanding between yourselves and Mr. Ripley. We learn from our neighbors, engaged in the manufacture of this article, that they now hold it at \$30 per ton, and shall not sell it at a less price through the season; and consequently we shall not consider ourselves holden to the offer made to you on the 2d inst., unless you signify your acceptance thereof by return mail, but shall furnish the balance of Ripley & Averill's order in conformity with the contracts made with them.

Do you accept of our proposal for supplying you with rods, shapes, and band-iron; and if so, what quantity of each shall we send you? [Signed, "WASHINGTON IRON COMPANY, per JOHN THOMAS, Agent;" and addressed to the plaintiffs.]

HARTFORD, March 19th, 1836. DEAR SIR, — Your favor of the 17th came to hand last evening, too late to be answered before this morning. We note and duly appreciate your prompt assent to send us the balance of R. & A.'s order for hollow ware, at old prices. In our future purchases of that article, we will buy of you at \$28 per ton, six months, as offered in your favor of the 2d. We will also take the following shapes, &c., on your terms there given: 160 bundles of new sable or Swedes, different shapes, specified; also 40 bundles smaller shapes, to be of old sable, assorted; 120 bundles band-iron, assorted; 60 bundles half-inch spike rods; 200 bundles P S I horse-nail rods, or a ton, if convenient, in 28lb. bundles, sending 5 tons in all. [Signed by the plaintiffs, and addressed to JOHN THOMAS, Esq.]

In a letter dated March 21st, 1836, addressed to John Thomas, Esq., the plaintiffs alter their order for band-iron, varying the sorts.

WAREHAM, April 2d, 1836. Your favors of the 19th and 21st reached here in the absence of the writer. We regret that you had not sooner signified your acceptance of our proposition of the 2d of March, touching supplies of shapes, band-iron, &c., as we had, prior to the reception of your favors above alluded to, entered into such engagements in other markets as rendered it impossible for us to supply you with those articles on any terms. [Signed "WASHINGTON IRON COMPANY, per JOHN THOMAS, Agent;" and addressed to the plaintiffs.]

On the 6th of April, 1836, the plaintiffs addressed a letter to the defendant's agent, remonstrating against his conduct in refusing to send them the iron ordered. The defendant's agent replied, by a letter dated the 8th of April, as follows: —

On 29th February you ask our terms for 10 or 15 tons of rods and shapes. On 2d March we give them to you per mail. On 14th March you again address us upon another subject; but although our proposition, in ordinary course of mail, must have been in your hands 10 to 12 days, yet no allusion was made to it. On 16th, after replying to yours of 14th, we ask if you accede to our proposition of the 2d. After this, we waited for your reply until the 22d, when, not having heard from you, we made such other arrangements as made it impossible for us to fill your orders of 19th or 21st, both which came together in the same mail on 23d. We did not intend the question proposed to you in ours of 16th as a renewal of our proposals of the 2d ult., nor do we believe that it will bear that construction; but nevertheless we should have filled your order had it been seasonably received.

This correspondence was conducted through the mail; upon the part of the defendant, by his avowed agent, John Thomas, and by the plaintiffs themselves on their part. The plaintiffs resided in the city of Hartford, near the post-office.

The letter written by the defendant on the 16th of March, dated 14th, arrived at Hartford on the 18th of March, about 2 o'clock P. M. The plaintiff's answer to the letter, dated the 19th of March, was post-marked the 20th; and the letter written by the plaintiffs on the 21st of March was post-marked on the day of its date; and both letters arrived at Wareham at the same time, viz., on the 23d of March.

The plaintiffs claimed that during said month of March the price of the article, which was the subject of controversy, was constantly advancing in the market; and that they had sustained loss in their business by the non-compliance of the defendant with his contract.

The defendant introduced a witness to prove that letters mailed at Hartford for Wareham were, by the usual course of mail, sent by Providence, and would reach that place on the evening of the day after leaving Hartford,—but might be sent by Boston; although, when sent by Boston, on the days that both mails went, a letter would be one day longer in reaching Wareham; that a mail was sent every day from Hartford to Boston, and every day but Sunday from Hartford to Providence; that the Providence mail usually left the post-office in Hartford about 5 o'clock every morning, except Sunday, when no mail was sent, and Monday, when it left about 10 o'clock A.M. The mails were, in the course of business, closed one hour before they left the office. Upon the 19th of March, 1836, the Providence mail left the office at 25 minutes past 5 o'clock in the morning, and on the 21st at 6 minutes past ten in the morning. The 20th was Sunday; and letters put into the office on Saturday evening and on Sunday evening would be forwarded by the same mail. The usual course of business at the post-office in Hartford was to stamp or post-mark all letters, not on the day they were forwarded, but the day they were received into the office,—unless received after 9 o'clock in the evening, when they were post-marked as of the succeeding day.

Upon the facts so proved and disclosed in the correspondence, the plaintiffs claimed that the proposal of the defendant, in his letter of the 2d of March, to furnish the plaintiffs with rods, shapes, and band-iron, was renewed by his letter written 16th of March, and dated 14th; and that the plaintiffs, by their answer of the 19th of March, in due time signified their assent to the proposal therein contained; and thus was the contract stated in the declaration completed.

These claims of the plaintiffs were all resisted and denied by the defendant.

The Court charged the jury, that in mercantile transactions of this character, affected as they must be by the constant fluctuations of markets, the utmost promptitude must be exacted consistent with a due regard to ordinary business; and that if the letter written by the

plaintiffs, accepting the proposal of the defendant relative to said rods, bands, &c., was not delivered into the post-office in Hartford before the day it was post-marked, viz. the 20th of March, it was not sent in such reasonable time as to make their acceptance obligatory upon the defendant.

A verdict was thereupon returned for the defendant; and the plaintiffs moved for a new trial.

Hungerford, in support of the motion, contended, that by the plaintiffs' letter of the 19th of March, accepting the offer of the defendant, the contract was closed, and rendered binding upon the parties. In the first place, the plaintiffs were not bound to reply to this offer by return mail. The defendant had himself placed his proposals regarding hollow ware and iron upon different grounds. As to the former, it was a condition of the offer that the plaintiffs should signify their acceptance by return mail; but as to the latter, it was left open to be replied to in a reasonable time. *Johnson & al. v. King*, 2 Bing. 270. This was evidently the understanding of the parties. Secondly, the plaintiffs' letter of the 19th of March was in reasonable time. The plaintiffs' letter of acceptance was put into the post-office in season to go by the next regular mail after the return mail. The regular mail from Hartford to Wareham is by Providence. The defendant's letter of the 16th being received on Friday the 18th, the return mail was on Saturday the 19th. The next mail after the return mail was on Monday the 21st, there being no Providence mail on Sunday; and the plaintiffs' letter of the 19th was put into the post-office in season to go by Monday's mail. Thirdly, the plaintiffs had no advantage over the defendant in respect to any fluctuations in the market; for the defendant could revoke his offer at any time before it was accepted by the plaintiffs.

T. C. Perkins, contra, contended, 1. That the defendant had expressly limited his offer to a reply by return mail, with respect to the iron as well as the hollow ware. The original application of the plaintiffs, in their letter of the 29th of February, was for iron and hollow ware. The defendant, in his reply of the 2d of March, gives terms for iron and hollow ware; and in his letter of the 16th calls the attention of the plaintiffs to both these subjects; and in the same letter says he shall not consider himself bound by the offer made on the 2d, unless the plaintiffs signify their acceptance by return mail. *Eliason v. Henshaw*, 4 Wheat. 225.

2. That, aside from any express condition, the plaintiffs were bound to communicate their acceptance by return mail, if practicable. Here they had abundant time for this purpose; viz., all the afternoon and evening of the 18th. In oral negotiations, the answer must be immediate, — i.e., during the interview, — or it will not bind. If it were not so, the contract would be all on one side: the owner would be tied up from selling, while the applicant was not bound to buy; and the latter might wait for changes in the market, of which the former could

not have the benefit. This inconvenience and damage would be cast on the owner without any consideration received. A negotiation by correspondence stands on the same ground. The party to whom an offer is made is bound to decide upon it as soon as it reaches him; and if he assents, to notify the other party immediately. *Mactier's Admsrs. v. Frith*, 6 Wend. 103, 114, 122, 131.

3. That it is not necessary, in order to vindicate the charge, to claim that the plaintiffs should have replied by the first mail practicable. The charge allowed them for this purpose, not only the afternoon and evening of the 18th, but nearly the whole of the 19th. The question therefore is, whether the plaintiffs could hold back their answer until the 20th, watching the fluctuations in the market, and then bind the defendant by their acceptance. It is said the plaintiffs did communicate their answer by the first regular mail after the return mail. The first answer to this is, that a letter put into the post-office on the 19th might have gone by the Boston mail on the 20th (Sunday), and have reached Wareham sooner than by the Providence mail of Monday. But, secondly, this point does not depend solely on the time when the letter would arrive, but also, and principally, upon the time when the plaintiffs accepted the offer by putting their letter of acceptance into the post-office, thereby precluding themselves from further speculations on the markets. If this was not done, either on the day they received the defendant's letter, or on the day after, it was not done in reasonable time.

BISSELL, J. From the correspondence between these parties, and which is made a part of the case, it appears, that on the 29th of February, 1836, the plaintiffs inquired of the defendant upon what terms he would supply them with ten or fifteen tons of rods, shapes, and band-iron. To this communication the defendant replied on the 2d of March, specifying the terms on which he would furnish the articles in question. On the 14th the plaintiffs wrote to the defendant on other business; but took no notice of his offer. The defendant replied on the 16th; and at the close of his letter he inquires of the plaintiffs whether they accept his proposal regarding the rods, shapes, and bands. This letter, it appears, arrived at Hartford on the 18th, about 2 o'clock afternoon. The plaintiffs accept the defendant's proposals in a letter dated on the 19th, but which the jury have found was not delivered into the post-office at Hartford until the 20th; and the 20th being Sunday, and no mail leaving Hartford on that day, the letter was not actually sent until the morning of the 21st. And it further appears that this letter, and also another from the plaintiffs, dated the 21st, reached the defendant on the 23d. It also appears that the defendant, having waited for the plaintiffs' answer until the 22d, and having heard nothing from them, then made such arrangements as rendered it impossible for him to comply with their order. It is further found, that on the 19th of March the Providence mail left the office at Hartford at 25 minutes past 5 o'clock; and that a letter forwarded by that mail

would have reached the defendant on the evening of the following day.

The great question in the case is, whether upon these facts there has been such an acceptance of the defendant's offer as that he is bound by it.

The jury were instructed that if the letter written by the plaintiffs, accepting the proposal of the defendant, was not delivered into the post-office at Hartford until the 20th of March, it was not sent in such reasonable time as to make their acceptance obligatory on the defendant.

Several questions, not immediately growing out of the charge, but which, if decided in favor of the defendant, make an end of the case, have been much discussed at the bar.

1. It has been contended that the proposal of the defendant, in his letter of the 2d, was not renewed by his letter of the 16th of March. Upon this point no opinion was given by the judge on the circuit, unless an opinion may be inferred from the ground on which he rested the case in his instructions to the jury. Nor is it essential that a decided opinion on the question should be expressed by this Court; because there are other grounds on which we are unanimously of opinion that the ruling of the judge below must be sustained.

Were this, however, a turning point in the case, we should probably be prepared to say that the defendant's letter of the 16th of March does contain a distinct renewal of his former proposal. His language is certainly very strong to show that such was his intention. He says: "Do you accept of our proposal for supplying you with rods, shapes, and band-iron; and if so, what quantity of each shall we send you?" Now we cannot but think that the fair and obvious construction of this language is that the defendant then stood ready to supply the articles upon the terms already specified. And such appears to have been his own view of the case, as is manifest from his subsequent letter of the 8th of April.

2. It has been urged, that admitting this letter to contain a renewal of the former proposal, yet, *by the terms of it*, the plaintiffs were bound to signify their acceptance by return of mail. The question, in this aspect of it, is manifestly independent of any mercantile usage. That the defendant had a right to attach this condition to his offer is undeniable. The question is, whether he has done so; and whether such is the true construction of his letter.

In his letter of the 2d of March, the defendant had offered to supply the plaintiffs an assortment of hollow ware at certain prices; and in regard to this offer, in his letter of the 16th, he says: "We shall not consider ourselves holden to the offer made you on the 2d inst., unless you signify your acceptance thereof by return of mail;" and he then puts the inquiry with regard to rods, shapes, and band-iron, that has been already mentioned. Now, it should be borne in mind, that the defendant's proposal, in regard to these articles, had already been

before the plaintiffs for at least ten or twelve days; and one claim put forth by them on the trial was, that during the month of March the price of these articles was constantly advancing in the market. The question then arises, whether under these circumstances it was the intention of the defendant to give them further time; and whether such intention can be fairly inferred from the language of his communication. In regard to the hollow ware, there can be no question. The plaintiffs were positively required to signify their acceptance by return mail. And when, in the same letter and under similar circumstances, they are also required to decide upon the proposal in regard to the rods, &c., it is certainly not easy to see why the defendant should have made, or should have intended to make, a distinction between these classes of articles. Had the judge directed the jury that the defendant was not bound, unless the plaintiffs signified their acceptance by return of mail, we are by no means satisfied that the direction would have been wrong. As, however, he placed the case on grounds more favorable to the plaintiffs' claim, a decision upon this point is unnecessary. Any further discussion of it is therefore waived.

3. We come then to the inquiry, whether the instruction actually given to the jury is correct in point of law. And here it may be remarked, that it is very immaterial when the letter of the plaintiffs was *written*: until *sent*, it was entirely in their power and under their control, and was no more an acceptance of the defendant's offer than a bare determination, locked up in their own bosoms and uncommunicated, would have been. And it surely will not be claimed that mere volitions, a mere determination to accept a proposal, constitute a contract. The plaintiffs then did not accept the defendant's proposition until the 20th, and for aught that appears [not] until the evening of that day. That they were bound to accept within a reasonable time was distinctly admitted in the argument; and if not admitted, the position is undeniable. The case of the plaintiffs then comes to this, and this is the precise ground of their claim: That they had a right to hold the defendant's offer under advisement for more than forty-eight hours, and to await the arrival of three mails from New York, advising them of the state of the commodity in the market; and having then determined to accept, the defendant was bound by his offer; and that this constitutes a valid mercantile contract. Now, in regard to such a claim, we can only say, that it appears to us to be in the highest degree unreasonable; and that we know of no principle, of no authority, from which it derives the slightest support.

Indeed, it seems to us to be subversive of the whole law of contracts. For it is most obvious, that, if during the interval the defendant was bound by his offer, there was an entire want of mutuality: the one party was bound, while the other was not. Had the proposition been made at a personal interview between the parties, there can be no pretence that it would have bound the defendant beyond the termination of the interview. The case of *Cooke v. Oxley*, 3 Term Rep. 653, is

decisive on this point, and goes much further. There, A., having proposed to sell goods to B., gave him, at his request, a certain time to determine whether he would buy them or not; and it was held, that although B. determined within the time, A. was not bound. And Lord Kenyon there says: "Nothing can be clearer than that at the time of entering into this contract, the engagement was all on one side; the other party was not bound; it was, therefore, *nudum pactum*." So also in the case of *Payne v. Cave*, 3 Term Rep. 148, it was decided that the bidder at an auction, under the usual conditions that the highest bidder shall be the purchaser, may retract his bidding at any time before the hammer is down.

Now, it is most manifest, that if the principle of these cases is to be applied to and govern the present, they are entirely decisive of it in favor of the defendant. It is however claimed, and perhaps justly, that the case of *Cooke v. Oxley* has been disregarded, if not overruled, by the more modern decisions; or at least that it has been holden not to apply to mercantile contracts, negotiated through the medium of the post-office. Thus, in the case of *Adams v. Lindsell*, 1 B. & A. 681, there was an offer to sell goods on certain specified terms, provided an acceptance of the offer was signified by return of mail. This was done; and it was held (the defendant not having retracted his offer in the mean time), that the contract was complete. It is not easy to reconcile this decision with that of *Cooke v. Oxley*, unless it can be distinguished on the ground that, as the offer was made through the mail, the party is to be considered as repeating the offer at every moment until the other party has had an opportunity of manifesting his acceptance. And this seems to have been the ground on which the case was placed by the Court of King's Bench. They say: "If the defendants were not bound by their offer, when accepted by the plaintiffs, till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendant had received their answer, and was bound by it; and so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is completed by the acceptance of it by the latter."

These positions are questioned, if not directly controverted, by Best, C. J., in the case of *Routledge v. Grant*, 4 Bing. 653. He says, "If they are to be considered as making the offer till it is accepted, the other may say, 'Make no further offer, because I shall not accept it;' and to place them on an equal footing, the party who offers should have the power of retracting, as well as the other of rejecting; therefore I cannot bring myself to admit that a man is bound when he says, 'I will sell you goods on certain terms, receiving your answer in course of post.'" He does not, however, profess to overrule the case of *Adams v. Lindsell*; nor was it necessary, as there were other grounds on which the rule in *Routledge v. Grant* was discharged.

In the case of *M'Culloch v. The Eagle Ins. Co.*, 1 Pick. 281, decided by the Supreme Court of Massachusetts, the case of *Cooke v. Oxley* is cited with approbation and followed. And the decision there cannot easily be reconciled to the doctrines advanced in *Adams v. Lindsell*. For it was there held, that an offer to insure the plaintiff's vessel at a given premium, communicated by mail and promptly accepted, was not binding on the defendants, they having in the mean time written a letter retracting their offer. This decision proceeded upon the ground that the treaty was open until the plaintiff's letter notifying his acceptance, was received; and that, in the mean time, the defendants have a right to withdraw their offer. Parker, C. J., in giving the opinion of the Court, said, "The offer did not bind the plaintiff until it was accepted; and it could not be accepted, to the knowledge of the defendants, until the letter announcing the acceptance was received, or at most until the regular time for its arrival by mail had elapsed."

The case of *Adams v. Lindsell* is regarded as an authority, and followed, by the Supreme Court of Errors of the State of New York, in *Mactier v. Frith*, 6 Wend. 103. And there the doctrine is asserted, that the acceptance of an offer, made through the medium of a letter, binds the bargain, if the party making the offer has not in the mean time revoked it. And the rule adopted in Massachusetts, that regards the contract as incomplete until the party making the offer is notified of the acceptance, is rejected. The doctrine of *Adams v. Lindsell* and of *Mactier v. Frith* may perhaps be considered as receiving the implied sanction of the Supreme Court of the United States, in the case of *Eliason v. Henshaw*, 4 Wheat. 225; although a decision upon the precise point was unnecessary, the offer there not having been accepted according to the terms on which it was made.

We do not feel that the task is imposed upon us of reconciling these conflicting authorities, if indeed they do conflict; for within the principle of none of them can the claim of the plaintiffs be established.

In *Mactier v. Frith*, which goes as far as any of the cases on this subject, the rule is laid down, that the offer continues until the letter containing it is received, and the party has had a fair opportunity to answer it. And it is further said, that a letter written would not be an acceptance, so long as it remained in the possession or under the control of the writer. An offer then, made through a letter, is not continued beyond the time that the party has a "fair opportunity" to answer it. This is substantially the doctrine of the charge. And it is not only highly reasonable, but is supported by all the analogies of the law. Once establish the principle that a party to whom an offer is made may hold it under consideration more than forty-eight hours, watching in the mean time the fluctuations of the market, and then bind the other party by his acceptance, and it is believed that you create a shock throughout the commercial community, utterly destructive of all mercantile confidence. No offers would be made by letter. It would be unsafe to make them.

It is only necessary to apply these principles to the case before us ; and their application is exceedingly obvious. The proposal of the defendant, which had already been several days before the plaintiffs, was renewed early on the afternoon of the 18th. They show no act done by them signifying their acceptance, until the evening of the 20th. Was this within a reasonable time? Was this the first fair opportunity of manifesting their acceptance? We think this can hardly be claimed. Had the defendant had an agent in Hartford, through whom the offer was made, might the plaintiffs thus have delayed the communication of their acceptance to him? This would not be pretended. And can it vary the principle, that the offer, instead of being thus made, was made through the agency of the post-office? Had the offer of the defendant been promptly accepted, information of the acceptance would have reached the defendant on the evening of the 20th, in due course of mail. He waited until the 22d ; and hearing nothing from the plaintiffs, he then virtually retracted his offer, by making such arrangements as made it impossible for him to fill their order. We think he was fully justified in so doing ; and that upon every sound principle the rule in this case must be discharged.

In this opinion the other Judges concurred.

New trial not to be granted.

WILLIAM LORING AND ANOTHER v. CITY OF BOSTON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH TERM, 1844.

[*Reported in 7 Metcalf, 409.*]

ASSUMPSIT to recover a reward of \$1000, offered by the defendants for the apprehension and conviction of incendiaries. Writ dated September 30th, 1841.

At the trial before Wilde, J., the following facts were proved : On the 26th of May, 1837, this advertisement was published in the daily papers in Boston : “\$500 reward. The above reward is offered for the apprehension and conviction of any person who shall set fire to any building within the limits of the city. May 26, 1837. Samuel A. Eliot, Mayor.” On the 27th of May, 1837, the following advertisement was published in the same papers : “\$1000 reward. The frequent and successful repetition of incendiary attempts renders it necessary that the most vigorous efforts should be made to prevent their recurrence. In addition to the other precautions, the reward heretofore offered is doubled. One thousand dollars will be paid by the city for the conviction of any person engaged in these nefarious practices. May 27, 1837. Samuel A. Eliot, Mayor.” These advertisements were continued in the papers but about a week ; but there was

no vote of the city government, or notice by the mayor, revoking the advertisements, or limiting the time during which they should be in force. Similar rewards for the detection of incendiaries had been before offered, and paid on the conviction of the offenders; and at the time of the trial of this case, a similar reward was daily published in the newspapers.

In January, 1841, there was an extensive fire on Washington Street, when the Amory House (so called) and several others were burnt. The plaintiffs suspected that Samuel Marriott, who then boarded in Boston, was concerned in burning said buildings. Soon after the fire said Marriott departed for New York. The plaintiffs declared to several persons their intention to pursue him and prosecute him, with the intention of gaining the reward of \$1000 which had been offered as aforesaid. They pursued said Marriott to New York, carried with them a person to identify him, arrested him, and brought him back to Boston. They then complained of him to the county attorney, obtained other witnesses, procured him to be indicted and prosecuted for setting fire to the said Amory House. And at the March Term, 1841, of the Municipal Court, on the apprehension and prosecution of said Marriott, and on the evidence given and procured by the plaintiffs, he was convicted of setting fire to said house, and sentenced to ten years' confinement in the State Prison.

William Barnicoat, called as a witness by the defendants, testified that he was chief engineer of the fire department in Boston, in 1837, and for several years after; that alarms of fire were frequent before the said advertisement in May, 1837; but that from that time till the close of the year 1841, there were but few fires in the city.

As the only question in the case was, whether said offer of reward continued to be in force when the Amory House was burnt, the case was taken from the jury by consent of the parties, under an agreement that the defendants should be defaulted, or the plaintiffs become nonsuit, as the full Court should decide.

Peabody & J. P. Rogers, for the plaintiffs.

J. Pickering (City Solicitor), for the defendants.

SHAW, C. J. There is now no question of the correctness of the legal principle on which this action is founded. The offer of a reward for the detection of an offender, the recovery of property, and the like, is an offer or proposal, on the part of the person making it, to all persons, which any one capable of performing the service may accept at any time before it is revoked, and perform the service; and such offer on one side, and acceptance and performance of the service on the other, is a valid contract made on good consideration, which the law will enforce.¹ That this principle applies to the offer of a reward to

¹ "The offer of a reward or compensation, either to a particular person or class of persons, or to any and all persons, is a conditional promise; and if any one to whom such offer is made shall perform the service before the offer is revoked, such performance is a good consideration, and the offer becomes a legal and binding con-

the public at large was settled in this Commonwealth in *Symmes v. Frazier*, 6 Mass. 344; and it has been frequently acted upon, and was recognized in the late case of *Wentworth v. Day*, 3 Met. 352.

The ground of defence is, that the advertisement, offering the reward of \$1000 for the detection and conviction of persons setting fire to buildings in the city, was issued almost four years before the time at which the plaintiffs arrested Marriott and prosecuted him to conviction; that this reward was so offered in reference to a special emergency in consequence of several alarming fires; that the advertisement was withdrawn and discontinued; that the recollection of it had passed away; that it was obsolete, and by most persons forgotten; and that it could not be regarded as a perpetually continuing offer on the part of the city.

We are then first to look at the terms of the advertisement, to see what the offer was. It is competent to the party offering such reward to propose his own terms; and no person can entitle himself to the promised reward without a compliance with all its terms. The first advertisement offering the reward demanded in this action was published May 26th, 1837, offering a reward of \$500; and another on the day following, increasing it to \$1000. No time is inserted in the notice, within which the service is to be done for which the reward is claimed. It is therefore relied on as an unlimited and continuing offer.

In the first place, it is to be considered that this is not an ordinance of the city government, of standing force and effect; it is an act temporary in its nature, emanating from the executive branch of the city government, done under the exigency of a special occasion indicated by its terms, and continued to be published but a short time. Although not limited in its terms, it is manifest, we think, that it could not have been intended to be perpetual, or to last ten or twenty years or more; and therefore must have been understood to have some limit. It was insisted, in the argument, that it had no limit but the Statute of Limitations. But it is obvious that the Statute of Limitations would not operate so as to make six years from the date of the offer a bar. The offer of a reward is a proposal made by one party, and does not become a contract until acted upon by the performance of the service by the other, which is the acceptance of such offer, and constitutes the agreement of minds essential to a contract. The six years, therefore, would begin to run only from the time of the service performed and the cause of action accrued, which might be ten, or twenty, or fifty years from the time of the offer, and would in fact leave the offer itself unlimited by time.

Supposing, then, that by fair implication there must be some limit to this offer, and there being no limit in terms, then by a general rule of

tract. Of course, until the performance, the offer of a reward is a proposal merely, and not a contract, and therefore may be revoked at the pleasure of him who made it." *Shaw, C. J., Freeman v. City of Boston*, 5 Met. 56, 57. — En.

law it must be limited to a *reasonable time*; that is, the service must be done within a reasonable time after the offer made.

What is a reasonable time, when all the facts and circumstances are proved on which it depends, is a question of law. To determine it, we are first to consider the objects and purposes for which such reward is offered. The principal object obviously must be to awaken the attention of the public, to excite the vigilance and stimulate the exertions of police officers, watchmen, and citizens generally, to the detection and punishment of offenders. Possibly, too, it may operate to prevent offences, by alarming the fears of those who are under temptation to commit them, by inspiring the belief that the public are awake, that any suspicious movement is watched, and that the crime cannot be committed with impunity. To accomplish either of these objects, such offer of a reward must be notorious, known and kept in mind by the public at large; and for that purpose the publication of the offer, if not actually continued in newspapers, and placarded at conspicuous places, must have been recent. After the lapse of years, and after the publication of the offer has been long discontinued, it must be presumed to be forgotten by the public generally, and, if known at all, known only to a few individuals who may happen to meet with it in an old newspaper. The expectation of benefit then from such a promise of reward must in a great measure have ceased. Indeed, every consideration arising from the nature of the case confirms the belief that such offer of reward, for a special service of this nature, is not unlimited and perpetual in its duration, but must be limited to some reasonable time. The difficulty is in fixing it. One circumstance (perhaps a slight one) is that the act is done by a board of officers, who themselves are annual officers. But as they act for the city, which is a permanent body, and exercise its authority for the time being, and as such a reward might be offered near the end of the year, we cannot necessarily limit it to the time for which the same board of mayor and aldermen have to serve; though it tends to mark the distinction between a temporary act of one branch and a permanent act of the whole city government.

We have already alluded to the fact of the discontinuance of the advertisement, as one of some weight. It is some notice to the public that the exigency has passed for which such offer of a reward was particularly intended. And though such discontinuance is not a revocation of the offer, it proves that those who made it no longer hold it forth conspicuously as a continuing offer; and it is not reasonable to regard it as a continuing offer for any considerable term of time afterwards.

But it is not necessary, perhaps not proper, to undertake to fix a precise time as reasonable time; it must depend on many circumstances. It is somewhat analogous to the case of notes payable on demand, where the question formerly was, within what time such note must be presented, and, in case of dishonor, notice be given, in order to charge


the indorser. In the earliest reported case on the subject (*Field v. Nickerson*, 13 Mass. 131), the Court went no farther than to decide that eight months was not a reasonable time for that purpose.

Under the circumstances of the present case, the Court are of the opinion that three years and eight months is not a reasonable time within which, or rather to the extent of which, the offer in question can be considered as a continuing offer on the part of the city. In that length of time, the exigency under which it was made having passed, it must be presumed to have been forgotten by most of the officers and citizens of the community, and cannot be presumed to have been before the public as an actuating motive to vigilance and exertion on this subject; nor could it justly and reasonably have been so understood by the plaintiffs. We are therefore of opinion that the offer of the city had ceased before the plaintiffs accepted and acted upon it as such, and that consequently no contract existed upon which this action, founded on an alleged express promise, can be maintained.

Plaintiffs nonsuit.

THE BOSTON AND MAINE RAILROAD v. JOSEPH H.
BARTLETT AND ANOTHER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH TERM, 1849.

[*Reported in 3 Cushing, 224.*] 

THIS was a bill in equity for the specific performance of a contract in writing.

The plaintiffs alleged that the defendants, on the 1st of April, 1844, being the owners of certain land situated in Boston, and particularly described in the bill, "in consideration that said corporation would take into consideration the expediency of buying said land for their use as a corporation, signed a certain writing, dated April 1st, 1844," whereby they agreed to convey to the plaintiffs "the said lot of land for the sum of twenty thousand dollars, if the said corporation would take the same within thirty days from that date;" that afterwards, and within the thirty days, the defendants, at the request of the plaintiffs, "and in consideration that the said corporation agreed to keep in consideration the expediency of taking said land," &c., extended the said term of thirty days, by a writing underneath the written contract above mentioned, for thirty days from the expiration thereof; that, on the 29th of May, 1844, while the extended contract was in full force and unrescinded, the plaintiffs elected to take the land on the terms specified in the contract, and notified the defendants of their election, and offered to pay them the agreed price (producing the same in money) for a conveyance of the land, and requested the defendants to

execute a conveyance thereof, which the plaintiffs tendered to them for that purpose; and that the defendants refused to execute such conveyance, or to perform the contract, and had ever since neglected and refused to perform the same.

The defendants demurred generally.

J. P. Healy, for the defendants, contended that there was no allegation in the bill of a consideration for the contract, as originally made, or as extended; and consequently that the same was not enforceable either at law or in equity. *Howell v. George*, 1 Madd. 1; 2 Story, Eq. § 787; *Brownsmith v. Gilborne*, 2 Str. 738; *Colman v. Sarel*, 3 Brown's C. 12; 1 Madd. C. Pr. 327; 1 Fonblanque, 42. The counsel also referred to 1 Harr. Dig. 603; *Burnet v. Bisco*, 4 Johns. 235; *Tucker v. Woods*, 12 Johns. 190; *Bean v. Burbank*, 4 Shepl. 458.

G. Minot (with whom was *R. Choate*), for the plaintiffs, suggested, that if the demurrer was sustained, it would not be for the reason stated, but on the authority of *Cooke v. Oxley*, 3 T. R. 653, and *Tucker v. Woods*, 12 Johns. 190, which are not now law. The question is one of mutuality rather than of consideration. The offer of the defendants was a continuing one, which might have been withdrawn at any time; but, when accepted, the effect was the same as if the offer had only been made the moment before. Such an offer requires no consideration. When accepted, there is promise for promise.

The case of *Cooke v. Oxley* is overruled by *Adams v. Lindsell*, 1 B. & Ald. 681; *Mactier v. Frith*, 6 Wend. 103; *Peru v. Turner*, 1 Fairf. 185; *Kennedy v. Lee*, 3 Merivale, 441; *Averill v. Hedge*, 12 Conn. 424; *Carr v. Duval*, 14 Pet. 77; 1 Sugden on Vendors, 164; *M'Culloch v. Eagle Ins. Co.*, 1 Pick. 278. It is virtually overruled by the following cases decided by this Court: *Thayer v. Middlesex Mut. Fire Ins. Co.*, 10 Pick. 326; *Foster v. Boston*, 22 Pick. 33; *Bird v. Richardson*, 8 Pick. 252. See also the remarks in 20 Am. Jurist, 17, on the case of *Cooke v. Oxley*, and the case of *Hamilton v. Lycoming Mut. Ins. Co.*, 5 Barr, 339, in which it was virtually overruled.

Healy, in reply, said that in all the cases cited for the plaintiffs except the last, there was a consideration.

FLETCHER, J. In support of the demurrer in this case, the only ground assumed and insisted on by the defendants is, that the agreement on their part was without consideration, and therefore not obligatory. In the view taken of the case by the Court, no importance is attached to the consideration set out in the bill; namely, "that the plaintiffs would take into consideration the expediency of buying the land." The argument for the defendants, that their agreement was not binding because without consideration, erroneously assumes that the writing executed by the defendants is to be considered as constituting a contract at the time it was made. The decision of the court in Maine in the case of *Bean v. Burbank*, 4 Shepl. 458, which was referred to for the defendants, seems to rest on the ground assumed by them in this case.

In the present case, though the writing signed by the defendants was but an offer, and an offer which might be revoked, yet, while it remained in force and unrevoked, it was a continuing offer during the time limited for acceptance; and, during the whole of that time, it was an offer every instant; but as soon as it was accepted it ceased to be an offer merely, and then ripened into a contract. The counsel for the defendants is most surely in the right, in saying that the writing when made was without consideration; and did not therefore form a contract. It was then but an offer to contract; and the parties making the offer most undoubtedly might have withdrawn it at any time before acceptance.

But when the offer was accepted, the minds of the parties met, and the contract was complete. There was then the meeting of the minds of the parties, which constitutes and is the definition of a contract. The acceptance by the plaintiffs constituted a sufficient legal consideration for the engagement on the part of the defendants. There was then nothing wanting, in order to perfect a valid contract on the part of the defendants. It was precisely as if the parties had met at the time of the acceptance, and the offer had then been made and accepted, and the bargain completed at once.

A different doctrine, however, prevails in France and Scotland and Holland. It is there held, that whenever an offer is made, granting to a party a certain time within which he is to be entitled to decide whether he will accept it or not, the party making such offer is not at liberty to withdraw it before the lapse of the appointed time. There are certainly very strong reasons in support of this doctrine. Highly respectable authors regard it as inconsistent with the plain principles of equity that a person who has been induced to rely on such an engagement, should have no remedy in case of disappointment. But, whether wisely and equitably or not, the common law unyieldingly insists upon a consideration, or a paper with a seal attached.

The authorities, both English and American, in support of this view of the subject, are very numerous and decisive; but it is not deemed to be needful or expedient to refer particularly to them, as they are collected and commented on in several reports as well as in the text books. The case of *Cooke v. Oxley*, 3 Term Rep. 653, in which a different doctrine was held, has occasioned considerable discussion, and, in one or two instances, has probably influenced the decision. That case has been supposed to be inaccurately reported, and that in fact there was in that case no acceptance. But, however that may be, if the case has not been directly overruled, it has certainly in later cases been entirely disregarded, and cannot now be considered as of any authority.

As therefore, in the present case, the bill sets out a proposal in writing, and an acceptance and an offer to perform, on the part of the plaintiffs, within the time limited, and while the offer was in full force, all which is admitted by the demurrer, so that a valid contract in writing is shown to exist, the demurrer must be overruled.

WILLIAM H. TAYLOE, *Appellant*, v. THE MERCHANTS' FIRE INSURANCE COMPANY OF BALTIMORE.

SUPREME COURT OF THE UNITED STATES, JANUARY TERM, 1850.

[Reported in 18 *Curtis*, 191, 9 *Howard*, 390.]

THE case is stated in the opinion of the court.

Johnson, Attorney-General, for the appellant.

Lloyd and *Nelson*, contra.

NELSON, J., delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court for the district of Maryland, which was rendered for the defendants.

The case in the court below was this. William H. Tayloe, of Richmond County, Virginia, applied to John Minor, the agent of the defendants, residing at Fredericksburg, in that State, for an insurance upon his dwelling-house to the amount of \$8000 for one year; and, as he was about leaving home for the State of Alabama, desired the agent to make the application in his behalf.

The application was made accordingly, under the date of 25th November, 1844, and an answer received from the secretary of the company, stating that the risk would be taken at seventy cents on the hundred dollars, the premium amounting to the sum of fifty-six dollars. The agent stated in the application to the company the reason why it had not been signed by Tayloe: that he had gone to the State of Alabama on business, and would not return till February following; and that he was desired to communicate to him at that place the answer of the company.

On receiving the answer, the agent mailed a letter directed to Tayloe, under date of the 2d of December, advising him of the terms of the insurance, and adding: "Should you desire to effect the insurance, send me your check payable to my order for \$57, and the business is concluded." The additional dollar was added for the policy.

This letter, in consequence of a misdirection, did not reach Tayloe till the 20th of the month; who, on the next day, mailed a letter in answer to the agent, expressing his assent to the terms, and enclosing his check for the premium as requested. He also desired that the policy should be deposited in the bank for safe-keeping. This letter of acceptance was received on the 31st at Fredericksburg by the agent, who mailed a letter in answer the next day, communicating to Tayloe his refusal to carry into effect the insurance, on the ground that his acceptance came too late, the centre building of the dwelling-house in the mean time, on the 22d of the month, having been consumed by fire.

The company, on being advised of the facts, confirmed the view

taken of the case by their agent; and refused to issue the policy or pay the loss.

A bill was filed in the court below by the insured against the company, setting forth substantially the above facts, and praying that the defendants might be decreed to pay the loss, or for such other relief as the complainant might be entitled to.

I. Several objections have been taken to the right of the complainant to recover, which it will be necessary to notice; but the principal one is that the contract of insurance was not complete at the time the loss happened, and therefore that the risk proposed to be assumed had never attached.

Two positions have been taken by the counsel for the company for the purpose of establishing this ground of defence.

1. The want of notice to the agent of the company of the acceptance of the terms of the insurance; and,

2. The non-payment of the premium.

The first position assumes that, where the company have made an offer through the mail to insure upon certain terms, the agreement is not consummated by the mere acceptance of the offer by the party to whom it is addressed; that the contract is still open and incomplete until the notice of acceptance is received; and that the company are at liberty to withdraw the offer at any time before the arrival of the notice; and this even without communicating notice of the withdrawal to the applicant; in other words, that the assent of the company, express or implied, after the acceptance of the terms proposed by the insured, is essential to a consummation of the contract.

The effect of this construction is to leave the property of the insured uncovered until his acceptance of the offer has reached the company, and has received their assent; for if the contract is incomplete until notice of the acceptance, till then the company may retract the offer, as neither party is bound until the negotiation has resulted in a complete bargain between the parties.

In our apprehension, this view of the transaction is not in accordance with the usages and practice of these companies in taking risks; nor with the understanding of merchants and other business men dealing with them; nor with the principles of law, settled in analogous cases, governing contracts entered into by correspondence between parties residing at a distance.

On the contrary, we are of opinion that an offer under the circumstances stated, prescribing the terms of insurance, is intended and is to be deemed a valid undertaking on the part of the company, that they will be bound, according to the terms tendered, if an answer is transmitted in due course of mail, accepting them; and that it cannot be withdrawn, unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted.

This view of the effect of the correspondence seems to us to be but

carrying out the intent of the parties, as plainly manifested by their acts and declarations.

On the acceptance of the terms proposed, transmitted by due course of mail to the company, the minds of both parties have met on the subject, in the mode contemplated at the time of entering upon the negotiation, and the contract becomes complete. The party to whom the proposal is addressed has a right to regard it as intended as a continuing offer until it shall have reached him, and shall be in due time accepted or rejected.

Such is the plain import of the offer. And besides, upon any other view, the proposal amounts to nothing, as the acceptance would be but the adoption of the terms tendered, to be in turn proposed by the applicant to the company for their approval or rejection. For if the contract is still open until the company is advised of an acceptance, it follows of course that the acceptance may be repudiated at any time before the notice is received. Nothing is effectually accomplished by an act of acceptance.

It is apparent, therefore, that such an interpretation of the acts of the parties would defeat the object which both had in view in entering upon the correspondence.

The fallacy of the argument, in our judgment, consists in the assumption that the contract cannot be consummated without a knowledge on the part of the company that the offer has been accepted. This is the point of the objection. But a little reflection will show that, in all cases of contracts entered into between parties at a distance by correspondence, it is impossible that both should have a knowledge of it the moment it becomes complete. This can only exist where both parties are present.

The position may be illustrated by the case before us. If the contract became complete, as we think it did, on the acceptance of the offer by the applicant on the 21st December, 1844, the company of course could have no knowledge of it until the letter of acceptance reached the agent on the 31st of the month; and, on the other hand, upon the hypothesis it was not complete until notice of the acceptance, and then became so, the applicant could have no knowledge of it at the time it took effect. In either aspect, and indeed in any aspect in which the case can be presented, one of the parties must be unadvised of the time when the contract takes effect, as its consummation must depend upon the act of one of them in the absence of the other.

The negotiation being carried on through the mail, the offer and acceptance cannot occur at the same moment of time; nor, for the same reason, can the meeting of the minds of the parties on the subject be known by each at the moment of concurrence; the acceptance must succeed the offer after the lapse of some interval of time; and if the process is to be carried further in order to complete the bargain, and notice of the acceptance must be received, the only effect is to reverse the position of the parties, changing the knowledge of the completion from the one party to the other.

It is obviously impossible, therefore, under the circumstances stated, ever to perfect a contract by correspondence, if a knowledge of both parties at the moment they become bound is an essential element in making out the obligation. And as it must take effect, if effect is given at all to an endeavor to enter into a contract by correspondence, in the absence of the knowledge of one of the parties at the time of its consummation, it seems to us more consistent with the acts and declarations of the parties, to consider it complete on the transmission of the acceptance of the offer in the way they themselves contemplated, instead of postponing its completion till notice of such acceptance has been received and assented to by the company.

For why make the offer, unless intended that an assent to its terms should bind them? And why require any further assent on their part, after an unconditional acceptance by the party to whom it is addressed?

We have said that this view is in accordance with the usages and practice of these companies, as well as with the general principles of law governing contracts entered into by absent parties.

In the instructions of this company to their agent at Fredericksburg, he is advised to transmit all applications for insurance to the office for consideration; and that upon the receipt of an answer, if the applicant accepts the terms, the contract is considered complete without waiting to communicate the acceptance to the company; and the policy to be thereafter issued is to bear date from the time of the acceptance.

The company desire no further communication on the subject, after they have settled upon the terms of the risk, and sent them for the inspection of the applicant, in order to the consummation of the bargain. The communication of the acceptance, by the agent afterwards, is to enable them to make out the policy. The contract is regarded as complete on the acceptance of the terms.

This appears also to have been the understanding of the agent; for, on communicating to the insured the terms received from the company, he observes: "Should you desire to effect the above insurance, send me your check payable to my order for fifty-seven dollars, and the business is concluded;" obviously enough importing that no other step would be necessary to give effect to the insurance of the property upon the terms stated.

The cases of *Adams v. Lindsell*, 1 Barn. & Ald. 681, and *Mactier's Admrs. v. Frith*, 6 Wend. 103, are authorities to show that the above view is in conformity with the general principles of law governing the formation of all contracts entered into, between parties residing at a distance, by means of correspondence.

The unqualified acceptance by the one of the terms proposed by the other, transmitted by due course of mail, is regarded as closing the bargain from the time of the transmission of the acceptance.

This is also the effect of the case of *Eliason v. Henshaw*, 4 Wheat. 228, in this court, though the point was not necessarily involved in the

decision of the case. The acceptance there had not been according to the terms of the bargain proposed, for which reason the plaintiff failed.

2. The next position against the claim is the non-payment of the premium.

One of the conditions annexed to the policies of the company is, that no insurance will be considered as made or binding until the premium be actually paid; and one of the instructions to the agent was, that no credit should be given for premiums under any circumstances.

But the answer to this objection is, that the premium in judgment of law was actually paid at the time the contract became complete. The mode of payment had not been prescribed by the company, whether in specie, bills of a particular bank, or otherwise; the agent therefore was at liberty to exercise a discretion in the matter, and prescribe the mode of payment; and accordingly we find him directing in this case, that it may be paid by a check payable to his order for the amount. It is admitted that the insured had funds in the bank upon which it was drawn, at all times from the date of the check till it was received by the agent, sufficient to meet it; and that it would have been paid on presentment.

It is not doubted that, if the check for the premium had been received by the agent from the hands of the insured, it would have been sufficient; and in the view we have taken of the case, the transmission of it by mail, according to the directions given, amounts in judgment of law to the same thing. Doubtless if the check had been lost or destroyed in the transmission, the insured would have been bound to make it good; but the agent in this respect trusted to his responsibility, having full confidence in his ability and good faith in the transaction.¹ . . .

Upon the whole, without pursuing the examination further, we are of opinion that the decree of the court below should be reversed, and that the cause be remitted, with directions to the court to take such further proceedings therein as may be necessary to carry into effect the opinion of this court.

VASSAR AND OTHERS v. CAMP AND OTHERS.

NEW YORK COURT OF APPEALS, SEPTEMBER TERM, 1854.

[*Reported in 1 Kernan, 441.*]

ACTION to recover damages for the breach of an alleged contract to deliver ten thousand bushels of barley.

On the trial of the cause at the Dutchess County Circuit, before

¹ The parts omitted relate to questions wholly foreign to the subject of "Mutual Consent."—ED

Justice Barculo, it was proved that the plaintiffs were brewers, doing business at Poughkeepsie, and the defendants merchants and produce-dealers at Sackett's Harbor; that on the 22d of August, 1850, the defendants addressed and forwarded to the plaintiffs at Poughkeepsie, by mail, a letter dated on that day at Sackett's Harbor, in which they say: "We will undertake to deliver you at Albany, between the 1st and 20th October next, from 5,000 to 10,000 bushels of first quality Jefferson county barley of this year's growth, at 67½ cents per bushel, and weighing not less than 48 lbs. per bushel. It being understood that if this offer shall be accepted, speedy notice of the same be given us;" and that on the 26th of the same month, the plaintiffs wrote and forwarded to the defendants by mail a letter, in which they say: "Yours of the 22d inst. is before us, and in reply we accept of your offer for 10,000 bushels Jefferson county barley, and herewith enclose a contract for the same, signed by us, with duplicate; the latter you will execute and return by the next mail."

This letter contained a contract signed by the plaintiffs, and a duplicate thereof to be signed by the defendants, which duplicate was in the words following: "Sackett's Harbor, August 26, 1850. For and in consideration of one dollar to us in hand paid by M. Vassar & Co., the receipt whereof is hereby acknowledged, we hereby agree to deliver them in the city of Albany, on or before the 20th of October next, 10,000 bushels of first quality Jefferson county two-rowed barley, of this season's growth, to weigh not less than 48 pounds per bushel, at sixty-seven and a half cents per bushel (67½-100), cash on delivery. Measuring divided as usual."

On the 30th of August, the defendants forwarded to the plaintiffs by mail a letter dated that day, in which they say: "Your favor of the 26th instant reached us this day. By reference to our proposal you will perceive that it was not restricted to any one particular kind of barley, except 'first quality Jefferson county barley.' We have therefore enclosed the contracts you sent us, and send you others with our signature and a duplicate for you to sign and send us. We have extended the period of delivery to the 30th of October, as there will be at least ten days' delay from the date of your letter before we can receive and act upon your reply. As soon as received, we shall send amongst the farmers and secure the first lots, even at an extra price, and, when not threshed out, shall caution them against breaking the barley as little as possible."

In this letter the defendants re-enclosed to the plaintiffs the contract and duplicate received from them, without signing the latter, and forwarded to the plaintiffs a proposed contract signed by the defendants, dated August 30th, 1850, in the same language as the duplicate above set forth, omitting the words "two-rowed," and inserting 30th of October instead of the 20th as the time for the delivery, with a duplicate thereof to be signed by the plaintiffs. This last-mentioned letter, with the enclosures, was received by the plaintiffs on the 3d or 4th of

September: and they signed the duplicate received by them, enclosed it in a letter which they addressed to the defendants at Sackett's Harbor, and on the 4th of September deposited this letter, so addressed, in the post-office at Poughkeepsie. In this last-mentioned letter, as appears by a copy thereof retained by them, the plaintiffs said: "Yours of the 30th ultimo, enclosing contract for 10,000 bushels of barley, was received this morning, and herewith return the duplicate signed by us. Your correction in regard to its being purely of the two-rowed kind was perfectly right, although in our letter of the 26th inst. it did not occur to us that your county raised any other kind of barley to any very considerable extent. We have no objection to receiving either kind, provided it has been grown together; but if it comes separately we expect you will keep it apart, it being quite difficult to malt it when mixed, grown on different farms. We are glad to notice your remark respecting care in selecting good qualities, and especially the caution to your farmers towards breaking the kernels in the process of threshing."

On the 14th of September the defendants wrote to the plaintiffs, referring to the letter of the former of the 30th of August, stating that they had been daily expecting and awaiting a reply, but had received none, and that there had been so much delay that it would be then difficult to purchase in Jefferson county the proposed quantities of first quality barley, as purchasers had within a few days previous been among the farmers, and engaged a large portion of the crop, and requesting that the proposed contract forwarded to the plaintiffs on the 30th of August be returned. To this the plaintiffs, under date of 19th September, replied, stating what they had done on the 4th of September, as hereinbefore stated. By subsequent letters the plaintiffs insisted that there was a valid contract which the defendants should fulfil, which the latter denied.

The defendants gave evidence tending to prove that the letter of the 4th of September, with the counterpart of the contract signed by the plaintiffs, was never received by them, or their agents or clerks, and that they had no knowledge or notice that the plaintiffs had assented to or signed the same until the receipt of their letter of the 19th of September; and that the defendants were in a situation and ready to have performed the contract, and could have done so with profit, if they had received the counterpart signed by the plaintiffs, or had notice that they assented to the contract at any time prior to about the middle of September.

The plaintiffs gave evidence tending to prove that the letter of the 4th of September was received by mail at the post-office at Sackett's Harbor, and placed by the postmaster in the letter-box of the defendants in that office.

The jury, in response to written interrogatories submitted to them by the court, found "that the letter of the plaintiffs of the 4th of September, containing the counterpart, and addressed and deposited as hereinbefore stated, was transmitted by mail to the post-office at

Sackett's Harbor, and was there deposited by the postmaster in the letter-box or drawer of the defendants in said office, on or about the 7th day of September aforesaid; and that there was no sufficient evidence that the defendants ever received such letter;" and also assessed the amount of damages in the event that the plaintiffs were entitled to recover. Thereupon the said justice ruled and decided that the contract was obligatory upon the defendants, and ordered judgment for the plaintiffs for the amount of the damages assessed; and the counsel for the defendants excepted. This judgment was affirmed by the Supreme Court at general term, in the second district. The defendants appealed to this Court.

There were other questions litigated and decided, distinct from the question whether or not there was a valid contract; but they were peculiar to the facts of this case, and not of general interest.

J. A. Spencer for the appellants.

C. Swan, for the respondents.

SELDEN, J. The first and most important question presented in this case is: Did the contract for the delivery of 10,000 bushels of barley at the city of Albany ever become obligatory upon the defendants; and if so, at what time?

It is insisted, on the part of the plaintiffs, that a contract was consummated by the correspondence between the parties, irrespective of either of the formal agreements signed by them respectively; that the proposition made by the defendants, under date of the 22d of August, was distinctly and unequivocally accepted by the plaintiffs in their letter of the 26th; and that the contract thus perfected, having been subsequently embodied in the agreement dated August 30th, takes effect from the 26th, when the offer was accepted. There are, however, two conclusive objections to this position. First. It is evident from the correspondence that there was no concurrence of the parties as to the precise terms of the contract, until the mutual execution of the written agreement, dated August 30th. The letters on one side mentioned only "first quality Jefferson county barley," while those on the other spoke of "two-rowed" barley. That this discrepancy in the views of the parties continued up to and after the 26th, is proved by the enclosures in the plaintiffs' letter of that day. The general acceptance of the defendants' offer, in the commencement of that letter, is qualified by the terms of the written contract enclosed, showing how the plaintiffs understood the offer. The plaintiffs cannot be held to have assented by that letter to any contract, except that which was embodied in the written agreement enclosed, to which the letter itself referred. The two must clearly be construed together. But again, if the parties had entirely agreed upon the terms of the contract in their previous correspondence, the change in the written agreement of the 30th of August, in regard to the time for the delivery of the barley, made that a new contract to take effect from the time of its adoption, and superseded the previous arrangement.

The real question then is as to the validity of the agreement dated August 30th, and as to the time when it took effect, if at all. This agreement was signed by the defendants, and transmitted by them on the day of its date by mail to the plaintiffs, with a counterpart to be signed by the latter and returned. The plaintiffs received the documents on the 4th of September, signed and enclosed the counterpart, and deposited it in the mail the same day, addressed to the defendants at Sackett's Harbor, where they resided. Was any thing more necessary to complete the agreement? did the contract become obligatory upon the deposit of the counterpart in the mail, duly executed by the plaintiffs, or was its receipt by the defendants, or notice to them of its execution, essential to its validity?

This precise question has been so fully considered in several modern cases, that it would be a work of entire supererogation to discuss it here. It arose in England in the case of *Adams v. Lindsell*, 1 Barn. & Ald. 681. In that case an offer to sell wool was made through the mail. The offer was received by the plaintiffs on the 5th of September, who wrote and mailed their answer, accepting the offer, the same evening; but this answer was not received until the 9th of September by the defendants, who in the meantime, supposing their offer had not been accepted, had sold the wool to other parties. The action was for the non-delivery of the wool; and if the contract was regarded as consummated on the 5th of September, when the answer accepting the offer was mailed, the defendants were liable; but if not until its receipt on the 9th, then no liability attached. The Court held unanimously that the contract became obligatory on the 5th, when the answer of the plaintiffs was deposited in the mail. In the case of *Mactier v. Frith*, 6 Wend. 103, the same question arose in this State, and was very elaborately discussed by our late Court of Errors. The Court in that case, by an almost unanimous vote, affirmed the doctrine of *Adams v. Lindsell*, in opposition to that of *McCulloch v. The Eagle Ins. Co.*, 1 Pick. 278, in which the Supreme Court of Massachusetts had adopted a different rule. The decision in *Mactier v. Frith* has since been followed in our State in the case of *Brisban v. Boyd*, 4 Paige, 17; in the State of Connecticut, in the case of *Averill v. Hedge*, 12 Conn. 424; in Pennsylvania, in the case of *Hamilton v. Lycoming Ins. Co.*, 5 Barr, 339; and in Georgia, in *Levy v. Coke*, 4 Georgia R. 1.

The question has also again arisen in England, and been passed upon by the House of Lords there, in the case of *Dunlop v. Higgins*, 12 Jurist, 295. In that case, the case of *Adams v. Lindsell* is referred to, and confirmed in the most decided and unequivocal terms. The doctrine of this case therefore, and that of *Mactier v. Frith*, 6 Wend. 103, must be considered as too firmly settled, both in this country and in England, to be shaken or doubted. It is moreover maintained, in the cases referred to, by the most satisfactory and conclusive reasoning.

But it is insisted by the defendants' counsel, that this case is taken out of the rule by the concluding clause in the defendants' letter of

the 30th August, which is in these words, viz. : " We have extended the period of delivery to the 30th of October, as there will be at least ten days' delay from the date of your letter before we can receive and act upon your reply. *As soon as received*, we shall send amongst the farmers and secure the first lots, even at an extra price, and where not threshed out, shall caution them against breaking the barley as little as possible." The idea advanced is, that this clause, taken in connection with that in the defendants' letter of the 22d August, in which they say, " It being understood that if this offer be accepted, speedy notice of the same be given us," is equivalent to an express condition that the defendants would be bound from the time when *they should receive* notice of the plaintiffs' acceptance, and not before. But this position gives, I think, a force and an interpretation to those clauses which was never intended, and which they will hardly bear. The clause in the letter of the 22d August cannot with propriety be supposed to refer to any other than a notice by mail, through which the whole negotiation was no doubt expected to be and was in fact conducted. When a notice is to be given by mail, in most cases, if not in all, it is sufficient for the party giving notice to deposit in the mail. He can do nothing more to insure its safe delivery, and is not responsible for its miscarriage. In regard to the clause in the letter of the 30th August, it appears to me plain that it was not intended and cannot be construed as fixing the time when the contract should become obligatory, but as expressive merely of the promptness with which the defendants *designed to act*, upon receiving notice that their offer was accepted. Something less equivocal than this should be required to change a fixed and settled rule of law.

My conclusion therefore is, that the contract was perfected, and became obligatory upon all the parties, on the 4th of September, when the counterpart was deposited in the mail, and not before. It being a contract purely prospective, having no relation to any thing past, the antedating has no effect whatever upon the time of its inception.

DENIO, J. [After discussing the other questions.] I come therefore to the inquiry, whether there was in fact any contract really concluded between the parties for the sale or for the procuring and delivery of barley by the defendants to the plaintiffs. There cannot be any dispute about the facts. The correspondence prior to the 30th August is only material for the purpose of determining who the contracting parties were, and as explanatory to what afterwards took place; for the defendants, by their letter of that date, inserted in the proposed contract a substantial alteration of the terms which the plaintiffs had proposed, which prevented it from amounting to an acceptance of the contract which the plaintiffs had offered to enter into. That letter was therefore a fresh proposal, and amounted to nothing unless it should be assented to by the plaintiffs. On the day the plaintiffs received it by mail at Poughkeepsie, they subscribed the brief contract enclosed in it, which they re-enclosed in a letter addressed to the de-

defendants at Sackett's Harbor. That letter with its enclosure arrived at its destination by due course of the mail, and was placed by the postmaster in the defendants' drawer at the post-office. It was afterwards lost, without actually reaching the hands of the defendants. I do not see the slightest reason to doubt the entire integrity of the defendants. They had no motive for suppressing the letter if they had received it, but a strong one for acknowledging and acting upon it. The loss of the letter was a misfortune by means of which some two thousand dollars were lost; and the question is upon which of these parties the law casts the burden of that loss. This depends upon the question whether a binding and operative executory contract resulted from the facts which have been mentioned; for if such a contract was effected, the plaintiffs were entitled to the benefit of it, though the breach on the part of the defendants was not wilful or designed, but was the result of accident and misfortune. Where two parties, both being present together, enter into negotiations looking to the making of a contract, the minds of both must ordinarily meet at the same time upon the same identical terms, or no contract is made. Where the parties reside at a distance from each other, and the negotiation is conducted by written correspondence, though there must be the assent of both parties to the same provisions, it is of course impracticable that such assent should be manifested simultaneously. One must state what he is willing to agree to, and the other must, when the proposition has reached him, assent to the same terms, and in some manner manifest that assent. Prior to the case which I am about to mention, the authorities were supposed to leave it doubtful whether a contract was created by the assent of the party to whom the proposal was made, until the evidence of such assent had actually come to the knowledge of the party who had made the proposal. That doubt was put at rest by the decision of the Court for the Correction of Errors, in *Mactier v. Frith*, 6 Wend. 106. Two persons were joint-owners of a cargo of brandy which had been shipped on their account in France for the port of New York. Frith, one of the parties, resided at St. Domingo; and Mactier, the other joint-owner, resided in New York. Frith, while the cargo was supposed to be at sea, wrote to Mactier, proposing that the latter should take the adventure solely on his own account. While that offer remained open, and after the brandy had arrived in New York, Mactier wrote to Frith that he had decided to take the adventure on his own account, and had credited him, Frith, with the invoice. The letter was forwarded; but before it could reach Frith, Mactier died, and a controversy arose between Frith and the representatives of Mactier as to the ownership of Frith's original share of the cargo. The determination of this controversy depended upon the question whether a contract of sale had been consummated before Mactier died. The court held, reversing a decree of the Chancellor, that such a contract had been concluded. The principle established was, that it was only necessary that there should be a concurrence of the minds of the parties upon

a distinct proposition, manifested by an overt act; that the sending of a letter announcing a consent to the proposal was a sufficient manifestation, and consummated the contract from the time it was sent. The court therefore held that the property in the brandies passed in Mactier's lifetime.

It would answer no useful purpose to review the antecedent authorities which were examined and considered in that case. Being a judgment of the court of last resort, it is high evidence of the law, and necessarily decides the question now before us, unless there is a material distinction in principle between the two cases. The contract in the case of *Frith v. Mactier* was an executed one; but the alleged agreement here was executory. I do not perceive that this constitutes a distinction favorable to the defendants. If such facts would constitute a contract which would pass the title to property, there is no good reason for holding that it would not be sufficient to bring into existence an executory undertaking, binding the parties by way of agreement.

The defendants' counsel, however, maintains that by a fair construction of the proposition made by the defendants in their letter of the 30th of August, it was made a condition that the contract should not become operative until the plaintiffs' assent had actually come to the knowledge of the defendants. Notwithstanding the rule of law which I have considered as settled by the judgment of the Court of Errors, I do not doubt but that a party proposing to contract may make it a condition that no bargain shall arise or be consummated until the affirmative answer of the party shall be actually received by the party proposing. The question then is, whether such a condition is found in this letter. It is not so stated in terms. By the next preceding letter of the plaintiffs they had proposed the 20th of October as the time for the delivery of the barley. The defendants changed the time by extending it ten days, till the 30th of October. For this change they give the following reason: "We have extended the period of delivery to the 30th of October, as there will be at least ten days' delay from the date of your letter before we can receive and act upon your reply." There is nothing in this, as it seems to me, indicative of an intention to shift the consequences of a miscarriage of a letter from the plaintiffs to the defendants. It is apparent that no idea of the loss or miscarriage of the plaintiffs' expected letter was in the minds of the defendants. They counted on the fidelity of the mails and of the officers of the post-office; and as a delay in completing the contract had arisen from the modification of the terms, they proposed a later period for the delivery of the barley, corresponding with that delay. To create a distinction which should be sufficient to take a case out of the rule of law to which I have referred, the condition should be explicitly stated, so that the party to whom the proposal is made may, should he think proper, despatch a messenger, or take some other method of performing the condition by bringing the acceptance home to the knowledge of the other party. But the letter proceeds: "As soon as received [that is, the answer], we shall send

among the farmers and secure the first lots," &c. This remark conveyed no intimation to the plaintiffs that a condition was intended to be annexed, which would change the ordinary rule of law. It seems to have been made in order to show the plaintiffs the kind of diligence and energy with which they intended to execute the contract. They had placed the time of delivery so remote as to afford them time to purchase and forward the barley after the receipt of the acceptance, taking into account the ordinary delays of the mail. That the mail was contemplated as the medium of transmission is perfectly plain from all the letters, and especially from the subsequent ones written by the defendants, in which they suggest that the miscarriage has been occasioned by an error in that department. Such delays the defendants took into consideration and provided for, but they made no suggestion as to what was to be the consequence of the miscarriage of a letter, simply because no such circumstance had crossed their minds. Upon the whole case, I am of opinion that the contract became operative when the plaintiffs signed the duplicate contract and placed it in the post-office addressed to the defendants, and that the accident by which the letter failed to come to the actual knowledge of the defendants was the misfortune of the defendants and not of the plaintiffs. I am consequently in favor of affirming the judgment of the Supreme Court.

*Judgment accordingly.*¹

ABRAM FITCH AND PROSSER JONES, *Appellants, v.*
ADRASTUS SNEDAKER, *Respondent.*

NEW YORK COURT OF APPEALS, JUNE TERM, 1868.

[*Reported in 38 New York Reports, 248.*]

WOODRUFF, J.² On the 14th of October, 1859, the defendant caused a notice to be published, offering a reward of \$200 . . . "to any person or persons who will give such information as shall lead to the apprehension and conviction of the person or persons guilty of the murder of" a certain unknown female.

On the fifteenth day of October, before the plaintiffs had seen or heard of the offer of this reward, one Fee was arrested and put in jail; and though not in terms so stated, the case warrants the inference that, by means of the evidence given by the plaintiffs on his trial and their efforts to procure testimony, Fee was convicted.

This action is brought to recover the reward so offered. On the trial the plaintiffs proved the publication of the notice, and then proposed to

¹ See *Duncan v. Topham*, 8 C. B. 225, *accord.* — ED.

² Clerke, J., delivered a short concurring opinion. — ED.

prove that they gave information before the notice was known to them, which led to the arrest of Fee. This evidence was excluded. The plaintiffs then offered to prove that, with a view to this reward, they spent time and money, made disclosures to the district attorney, to the grand jury, and to the court on the trial after Fee was in jail, and that without their effort, evidence, and exertion, no indictment or conviction could have been had. This evidence was excluded.

The Court thereupon directed a nonsuit.

It is entirely clear that, in order to entitle any person to the reward offered in this case, he must give such information as shall lead to both apprehension and conviction. That is, both must happen, and happen as a consequence of the information given. No person could claim the reward whose information caused the apprehension, until conviction followed: both are conditions precedent. No one could therefore claim the reward, who gave no information whatever until after the apprehension, although the information he afterward gave was the evidence upon which conviction was had, and however clear that, had the information been concealed or suppressed, there could have been no conviction. This is according to the plain terms of the offer of the reward, and is held in *Jones v. The Phoenix Bank*, 8 N. Y. 228; *Thatcher v. England*, 3 Com. Bench, 254.

In the last case it was distinctly held that, under an offer of reward, payable "on recovery of property stolen and conviction of the offender," a person who was active in arresting the thief and finding and restoring part of the stolen property, giving information to the magistrates, tracing to London other of the property, and producing pawnbrokers with whom the prisoner had pledged it, and who incurred much trouble and expense in bringing together witnesses for the prosecution, was not entitled to the reward, as it appeared that another person gave the first information as to the party committing the robbery.

In the present case, the plaintiff, after the advertisement of the defendant's offer of a reward came to his knowledge, did nothing towards procuring the arrest, nor which led thereto, for at that time Fee had already been arrested.

The cases above referred to therefore establish that, if no information came from the plaintiffs which led to the arrest of Fee, the plaintiffs are not entitled to recover, however much the information they subsequently gave, and the efforts they made to procure evidence, may have contributed to or even have caused his conviction; and therefore evidence that it was their efforts and information which led to his conviction was wholly immaterial, if they did not prove that they had given information which led to his apprehension, and was properly rejected.

The question in this case is simple. A murderer having been arrested and imprisoned in consequence of information given by plaintiff before he is aware that a reward is offered for such apprehension, is he entitled to claim the reward in case conviction follows?

The ruling on the trial, excluding all evidence of information given

by the plaintiffs before they heard of this reward, necessarily answers this question in the negative.

The case of *Williams v. Carwardine* (4 Barn. & Ad. 621, and same case at the assizes, 5 Carr. & Payne, 566) holds that a person who gives information according to the terms of an offered reward is entitled to the money, although it distinctly appears that the informer had suppressed the information for five months, and was led to inform, not by the promised reward, but by other motives. The Court said the plaintiff had proved performance of the condition upon which the money was payable, and that established her title; that the Court would not look into her motives. It does not appear by the reports of this case whether or not the plaintiff had ever seen the notice or handbill posted by the defendant, offering the reward; it does not therefore reach the precise point involved in the present appeal.

I perceive, however, no reason for applying to an offer of reward for the apprehension of a criminal any other rules than are applicable to any other offer by one, accepted or acted upon by another, and so relied upon as constituting a contract.

The form of action in all such cases is *assumpsit*. The defendant is proceeded against as upon his contract to pay, and the first question is, Was there a contract between the parties?

To the existence of a contract there must be mutual assent, or, in another form, offer and consent to the offer. The motive inducing consent may be immaterial, but the consent is vital. Without that there is no contract. How then can there be consent or assent to that of which the party has never heard? On the fifteenth day of October, 1859, the murderer, Fee, had, in consequence of information given by the plaintiffs, been apprehended and lodged in jail. But the plaintiffs did not, in giving that information, manifest any assent to the defendant's offer, nor act in any sense in reliance thereon; they did not know of its existence. The information was voluntary, and in every sense (material to this case) gratuitous. The offer could only operate upon the plaintiffs after they heard of it. It was prospective to those who will in the future give information, &c.

An offer cannot become a contract unless acted upon or assented to.

Such is the elementary rule in defining what is essential to a contract. Chitty on Con., 5th Am. ed., Perkins's notes, p. 10, 9 and 2, and cases cited. Nothing was here done to procure or lead to Fee's apprehension in view of this reward. Indeed, if we were at liberty to look at the evidence on the first trial, it would appear that Fee was arrested before the defendant offered the reward.

I think the evidence was properly excluded and the nonsuit necessarily followed.

The judgment should be affirmed.

*Judgment affirmed.*¹

¹ See *Neville v. Kelly*, 12 C. B. n. s. 740. — Ed.

COUNTESS OF DUNMORE AND HUSBAND, *Advocators.*
ELIZABETH ALEXANDER, *Respondent.*

COURT OF SESSION IN SCOTLAND, DECEMBER 15, 1830.

[*Reported in 9 Shaw and Dunlop, 190.*]

THE Countess of Dunmore, being about to change a servant, and having heard that Elizabeth Alexander was to leave the service of Lady Agnew of Lochnaw, wrote to her ladyship, mentioning the circumstance; stating that the wages she gave were 12*l.* 12*s.* per annum, and requesting to be informed as to Alexander's character. Lady Agnew, in answer, stated that she could recommend Alexander, who would gratefully accept the proposed wages; and her ladyship added as follows: "If Lady Dunmore decides upon taking Betty Alexander, perhaps she will have the goodness to mention whether she expects her at the new or the old term." On the 5th of November, the Countess wrote to Lady Agnew, requesting that she would "have the goodness to engage Betty Alexander for her at the 12*l.* 12*s.* a year, but she wishes to have her at the new term, or as soon after as possible, because her present one must go at that time." The letter went through the post-office to Lochnaw; but as Lady Agnew had gone to Glasserton House, it was sent to her there. Upon receiving it, Lady Agnew desired her housekeeper, Mrs. Moore (who had accompanied her), to notify the Countess's answer to Alexander, which was done by Moore making an addition on the letter itself and putting it into the post-office, addressed to Betty Alexander at Lochnaw. In the meanwhile, on the 6th of November (the day after writing the above letter), the Countess addressed another letter to Lady Agnew, intimating that she no longer needed Alexander. This second letter, which was also addressed to Lochnaw, was sent to Lady Agnew at Glasserton House, and was received immediately after the other had been despatched to the post-office; but Lady Agnew sent the second one by express to the post-office, and both the letters arrived at Lochnaw together, and were delivered at the same moment to Alexander. Lady Dunmore having declined to receive her, or pay her wages, Alexander raised an action against her in June, 1827, before the Sheriff of Stirlingshire, for wages and board-wages for six months, from Martinmas, 1826, to Whit-Sunday, 1827, at which time she had got a new situation.

In support of this demand, she maintained that there had been a completed contract, and that Lady Dunmore was not entitled to resile. On the other hand, her Ladyship contended, that as the two letters had been received by Alexander at one and the same time, she was made aware that her services would not be required, and therefore she could not allege a concluded contract.

The Sheriff Substitute, after finding the above facts, pronounced an interlocutor in these terms ; “ Finds that Lady Agnew’s card, formerly referred to, cannot from its terms be interpreted or considered otherwise than as an offer, on the part of the pursuer, to engage as a servant with the noble defender on the terms proposed in a communication, to which this card is obviously an answer ;— finds it doubtful whether the noble defender’s reply to Lady Agnew, contained in the card libelled on, uncommunicated in any way to the pursuer, can be held to be a legal acceptance of the offer ;— but finds it very clear, abstractedly from the specialties of the present case, that the said card, communicated, in the manner it has been done, to the pursuer by Lady Agnew through Mrs. Moore, must be held to be a legal acceptance of the offer, an actual engagement of the pursuer, and a completion of the contract, from which neither party was entitled to resile ;— therefore finds that the issue of this case depends on the solution of the question, whether a party who accepts of an offer is entitled at the same moment *unico contextu*, or with the same breath, to retract his acceptance. And the Sheriff Substitute being of opinion that the instant an offer is accepted of the contract is completed, it is not in the power of either party to retract or resile ;— that from the moment of acceptance, as expressed by Mr. Bell in treating of the contract of sale, there is between the parties *in idem placitum concursus et conventio*, which constitutes the contract ;— finds that, as in the present instance the contract was completed by the transmission of the card libelled on to the pursuer, the engagement between the parties was rendered indissoluble without the consent of both, and that it was consequently beyond the power of the noble defender at any time, however short the interval, to retract the acceptance, or resile from the engagement ;— on these grounds repels the defences, and decerns against the noble defenders in terms of the conclusion of the libel.”

The Sheriff Depute having adhered, the Countess advocated ; and the Lord Ordinary, having ordered cases, “ advocated the cause, approved of the findings in point of fact in the Sheriff’s interlocutor ; but altered the judgment of the Sheriff, sustained the defences, assolized the advocates,” and found no expenses due.¹

Alexander reclaimed.

¹ The Sheriff, in his interlocutor of 15 February, 1828, has stated the facts correctly, but his judgment seems inconsistent with the facts he has found. He puts his opinion on the ground that the contract was only completed by the communication to the pursuer of Mrs. Moore’s letters ; yet he conceives there was some interval betwixt her knowledge of the consent and of the recall which rendered the latter ineffectual. But as the letters were delivered to the pursuer by the same person and at the same moment, while it is impossible to know which was first read, they must be held as one communication, and the notification of recall being simultaneous with that of the consent must do it away altogether.

The pursuer in this court has not attempted to support the Sheriff’s view. But assuming that the Lady Agnew’s letter of the 2d of November contained an offer on the part of the pursuer, and that Lady Dunmore’s letter of the 5th was an acceptance of that offer, she contends that the contract was completed, so as to bar resiling,

LORD BALGRAY. The admission that the two letters were simultaneously received puts an end to the case. Had the one arrived in the morning, and the other in the evening of the same day, it would have been different. Lady Dunmore conveys a request to Lady Agnew

either by the writing or putting that letter into the post-office, or at least by its being received by Lady Agnew.

The Lord Ordinary thinks it doubtful if the letter of the 2d can be held as an offer made on the pursuer's part, or any thing but an answer to Lady Dunmore's inquiries. But at any rate it seems clear, from the terms of her letter of the 5th, that Lady Dunmore did not understand it as such, and that she did not mean her letter as an acceptance communicated to Lady Agnew, as acting for the pursuer. The letter plainly gives a commission to Lady Agnew to act as the writer's mandatory in engaging the pursuer, conceiving that the contract was still to be made. Now, having given such a commission, it was in the power of Lady Dunmore to give contrary instructions to her mandatory; and if these were received in such time that the mandatory was able to recall any step that she had taken before the contract was completed, no obligation could be incurred.

Even if the letter of the 5th could be viewed as an acceptance, it seems impossible to hold that it was sent to Lady Agnew as mandatory of the pursuer, so that the receipt of it by her completed the bargain. The writer plainly constitutes Lady Agnew as her mandatory in what was to be done, although it may be possible to hold that, by "engaging the pursuer," she meant that she should communicate to her the acceptance contained in her letter; and this communication was therefore necessary to perfect the location.

But the pursuer, on the authority of a passage in Mr. Bell's work, maintains that it is not necessary, in order to complete a consensual contract, that the acceptance should be communicated to the offerer, because the offerer having previously consented, the mere consent of the person to whom the offer is made constitutes the *consensus in idem placitum*, which is all that is requisite to perfect his engagement. But if the learned author's meaning is to be taken in the extensive sense here contended for, so as to bar the acceptor from resiling, it does not seem to be supported by sufficient authority. From the reason assigned, the mere existence of a consent in the acceptor's mind would have the effect to bind him,—a thing which might admit of being proved by a reference to oath. The pursuer indeed disclaims going this length, and contents herself with maintaining that any clear expression of the consent will be sufficient.

But surely the expression of consent made to a third person altogether unconnected with the offerer will not do, nor will the writing of a letter of acceptance be sufficient, if this letter is never sent. The Lord Ordinary conceives that if, after writing such a letter, the author should add a postscript, stating, that on further consideration, or in consequence of new intelligence, he did not choose to accept the offer, and if, from the letter's referring to other matters, he still thought it necessary to send it, the acceptance would be effectually recalled. But if this be the case, the same effect must follow when a second letter retracting the offer is transmitted by the same post, so as to be received at the same time, or where a communication to this effect is made by express or otherwise to the offerer before the acceptance reaches him. In short, each party may resile, so long as his offer or acceptance has not been communicated to the other party.

The pursuer may have suffered from the disappointment of her expectations; but the same hardship would have been felt, had Lady Dunmore written no letter but the last, in which case, however, the pursuer could have had no claim. The different ranks of the parties, and the great importance of the sum claimed to the one in comparison with the other, leads naturally to the giving all possible weight to the pursuer's argument. But any plea of favor of this kind is in a great measure done away by the very discreditable account which she has given as to her receipt of the letters, particularly in her deposition when examined as a haver in the Inferior Court.

to engage Alexander, which request she recalls by a subsequent letter, that arrives in time to be forwarded to Alexander as soon as the first. This, therefore, is just the same as if a man had put an order into the post-office, desiring his agent to buy stock for him. He afterwards changes his mind, but cannot recover his letter from the post-office. He therefore writes a second letter countermanding the first. They both arrive together, and the result is, that no purchase can be made to bind the principal.

LORD CRAIGIE. I take a different view. Lady Agnew, acting for the servant, writes to Lady Dunmore, stating Alexander's readiness to accept the proposed wages, recommending her on account of her character, and concluding thus: "If Lady Dunmore decides on taking Betty Alexander, perhaps she will have the goodness to mention whether she expects her at the new or old term." Now, what is the answer of the Countess? A request to Lady Agnew to engage the servant at the wages mentioned, accompanied with a notice that "she wishes to have her at the new term," &c. Lady Agnew was thus the mandatory for both parties, the mistress and the servant; she was on the same footing as a person in the well-known situation of broker for both buyer and seller. Every letter between the principals, relative to an offer or an acceptance respectively, was, as soon as it reached Lady Agnew, the same as delivered for behoof of the party on whose account it was written. I hold, therefore, that when Lady Dunmore's letter reached Lady Agnew, the contract of hiring Alexander was complete,—the offer on the part of Alexander being met by an intimated acceptance on the part of the Countess. No subsequent letter from the Countess to Lady Agnew could annul what had passed by the mere circumstance of its being delivered, at the same time with the first, into the hands of Alexander. I do not think the servant could have retracted after the first letter reached Lady Agnew; and if she was bound, it seems clear that the Countess could not be free.

LORD GILLIES. I am decidedly of the opinion first expressed. Lady Agnew received a letter desiring her to engage a servant for Lady Dunmore. She proceeds to take steps towards this by putting a letter into the post-office for the purpose of making the engagement. But before this letter reaches its destination, her authority to hire the servant is recalled; and, by the help of an express, she forwards the recall, so that it is eventually delivered through the same post with the former letter, and both reach the servant at once. They thus neutralize each other, precisely as in the case put by Lord Balgray, of an order and a countermand being sent through one post to an agent. I am therefore for adhering.

LORD PRESIDENT. I concur with the majority. There was no completed contract here, and Lady Dunmore was at liberty to resile as she did.

ALEXANDER THOMSON AND OTHERS (KEIR'S TRUSTEES),
Pursuers. JAMES JAMES, *Defender.*

COURT OF SESSION IN SCOTLAND, JULY 12, 1855.

[*Reported in 18 Dunlop, 1.*]

THE pursuers, Mr. Thomson and others, were trustees appointed by the late Mr. Keir of Renniston. The lands of Renniston having been advertised for sale, the defender, Mr. James, on 21st November, 1853, made an offer for the purchase of the estate by a letter addressed to Mr. Thomson as follows: "Provided that a good and marketable title is given, I offer you 6400*l.* (six thousand four hundred pounds) for the lands of Renniston; the purchase-money to be paid at such a time as may be hereafter mutually agreed upon."

On 24th November, 1853, Mr. Thomson replied to Mr. James, recommending that he should increase his offer by 50*l.*; and therefore stating that, before writing the parties interested in the sale, he should be glad to hear from Mr. James with the least possible delay, with an increase in his offer, and the terms of payment and interest he proposed.

In reply, Mr. James wrote as follows on 26th November, 1853:—

DEAR SIR, — I am in receipt of your letter of the 24th instant regarding Renniston. The price which I have offered, viz., 6400*l.*, is in my opinion above the value of the property, and I cannot therefore increase it by the 50*l.* as you propose; at the same time, I agree to be at half the expense of conveyance and stamps, and to the other conditions which you stipulate, except that I must insist upon a search, which I learn can now be had at much less expense than formerly. As regards the term of payment, I would propose Whit-Sunday next, and that my entry to the rents should be accordingly: this would save all questions as to rate of interest. Upon hearing from you that these terms are to be acceded to, the form necessary in such transactions will be gone through. I am, &c.

Mr. Thomson's reply was as follows:—

EDINBURGH, 28th Nov. 1853. DEAR SIR, — I am in receipt of yours of 26th, which I shall communicate to the parties, and give you their decision with the least possible delay. If, for the sake of 50*l.*, you don't get the place, or run the risk of a competition, all I can say is, you must not blame me. I remain, &c.

And on 1st December, 1853, Mr. Thomson again wrote to Mr. James as follows:—

DEAR SIR, — Annexed I beg to send copy of your offer for the lands of Renniston, dated 26th November, and I hereby accept the same, the price being six thousand four hundred pounds, payable at Whit-Sunday, eighteen hundred and fifty-four, and under the other stipulations referred to by you, as contained in my letter to you of 24th November, with this only alteration, that if you shall still wish for a search, it shall be furnished, though I humbly think, in the cir-

circumstances, you ought not to put the sellers to that expense. You had better instruct your agent to examine the titles now, so as to prevent any delay afterwards. Your entry to the lands is to be at Whit-Sunday next. I am, &c.

This acceptance of Mr. James's offer was posted at Edinburgh on 1st December. But of same date and on the morning of the same day, the defendant posted a letter at Jedburgh, addressed to Mr. Thomson, withdrawing his offer for the purchase of Renniston. Both letters were delivered on the 2d December, 1853.

In these circumstances, the pursuers, holding that the defender had not the power to withdraw his offer, raised the present action of implement against him. They founded upon the correspondence, and particularly the letters of 26th November and 1st December, 1853, as constituting a valid contract of sale binding upon both parties.

The defender pleaded: That the offer having been withdrawn by him before it was accepted, and before any acceptance was intimated or delivered to him, any acceptance thereafter written out could not constitute a contract by or with him or binding upon him.

It was thought expedient to ascertain precisely the hours at which the letters of 1st December had been posted, and would reach their destination. A joint minute was accordingly lodged by the parties, stating, in regard to the letter from Mr. Thomson to the defender, dated 1st December, 1853: 1. That it must have been posted at the Castle Street receiving-office between half-past two and half-past four P.M. on the 1st December, 1853; 2. That it would be brought to the head office in Edinburgh at 5 P.M. on the same day; 3. That the hours of despatch from the General Post Office, Edinburgh, to Kelso, on the 1st December, 1853, were 7.15 A.M., and 4.45 P.M.; 4. That the letter referred to would be despatched from the General Post Office, Edinburgh, at 7.15 on the morning of the 2d December, 1853. In regard to the letter from Mr. James to Mr. Thomson, dated 1st December, 1853: 1. That it must have been posted at Jedburgh before three P.M., and despatched *via* Kelso at that hour; 2. That it must have arrived at the General Post Office, Edinburgh, the same night at 8.19; 3. That it would not be sent out for delivery till seven o'clock in the morning of 2d December.

In these circumstances the Lord Ordinary pronounced the following interlocutor: "The Lord Ordinary, having heard the counsel for the parties on the closed record, and on the motion by the pursuers for decree in their favor without farther inquiry, refuses the said motion, and appoints the case to be enrolled in the motion-roll, in order that the mode of settling the disputed facts may be settled."¹

¹ The Lord Ordinary is of opinion that the letters libelled on, — viz., the letter of the defender to Mr. Thomson of 26th November, 1853, and the letter by the latter to the former, of 1st December thereafter, — were sufficient to constitute a binding contract of sale between the parties, provided the offer contained in the former of these letters was not recalled before it was accepted of by the latter. The defender, in making his offer, did not limit its binding effect to any specific period; and there

The pursuers reclaimed, and pleaded: That the offer was in general terms, and did not stipulate that the offerer should not be barred from retracting until the acceptance should actually reach him. It was immaterial, therefore, to inquire into details. It was sufficient that the defender's letter of retraction did not reach Mr. Thomson before the acceptance was posted. Nor could any unnecessary delay on the part of the pursuer in accepting the offer be pleaded against him. Therefore the question arose purely, whether, notwithstanding the letter of retraction, the defender's offer was binding on him.

In posting the letter of acceptance within a reasonable time, the pursuer had done all that was required of him. Farther, by posting the letter he had put it out of his power to regain possession of it.

was no such delay in the acceptance of that offer as rendered it inoperative at the time when it was accepted, if it had not been previously retracted.

On the other hand, the defender, as he did not state that he would remain bound by his offer for any definite period, was entitled, as the Lord Ordinary thinks, to retract that offer at any time before it was accepted of. And he maintains that, availing himself of that privilege, he retracted that offer on the 1st of December by his letter to Mr. Thomson of that date. Thus the question arises, whether the retraction of the offer by the one party, or the acceptance of it by the other, was the earlier in point of time.

The difficulty in determining this question appears to the Lord Ordinary to arise from the uncertainty as to which of the letters was first put into the post-office. If, at the time when Mr. Thomson's letter of acceptance was put into the post-office in Edinburgh, the defender's letter of retraction had not been placed in the post-office at Jedburgh, the bargain would appear to have been completed; because it appears to be settled, that when a written acceptance of such an offer is put into the post-office (in a case where the parties made the post-office the medium of conveying their communications), the contract of sale is thereby completed; and that the receipt of the acceptance by the offerer is not necessary in such a case; *vide* the case of Higgins, 2d July, 1847, D. ix. 1407, affirmed on appeal, 24th February, 1848, Bell, vi. 195; and it appears to the Lord Ordinary that on the same principle, when a written retraction of such an offer is put into the post-office before the offer is accepted, the offer is thenceforth recalled, and is no longer binding, and that the receipt of the retraction by the other party is not necessary for producing that effect.

At the debate, the parties, although they did not dispute that both the retraction and the acceptance were posted on the same day, — viz., the 1st of December, — were not agreed as to which of them was first posted; and in the hope of having this matter settled without judicial inquiry, the Lord Ordinary directed the parties to state in a minute what they were agreed upon as to the precise times of posting the letters. They accordingly lodged the joint minute No. 30 of process, and the statement in it is so far precise as to establish that the letter of retraction was put into the post-office at Jedburgh before three o'clock P. M., and the letter of acceptance was not put into the post-office in Edinburgh before half-past two o'clock P. M., on the 1st of December; but although both the letters were thus confessedly posted between half-past two and three o'clock of the same day, it is still left uncertain which of the two was first posted; and although the question of time is thus limited to a matter of minutes, yet the Lord Ordinary thinks that, on principle, the difference must be made the subject of inquiry, as if the dispute had related to hours or days. The pursuers, however, insist that they are entitled to decree in their favor without farther inquiry, on the admitted facts of the case, in respect that as they maintain the letter of retraction could have no effect until it was delivered; and they crave judgment on this point. It follows from what the Lord Ordinary has already stated, that he must refuse that motion.

The post-office then became not his messenger, but the messenger or servant of the person to whom the letter was addressed. The pursuer had lost all control over it, and could not have regained possession of it even if he had so desired. So far, therefore, as the pursuer was concerned, the letter of acceptance was delivered to the offerer by the act of posting.

But it was said that here there was no *concursum voluntatum*, and that such *concursum* was, according to the civilians, essential to the validity of every contract. But if by that was meant a concurrence of wills, the existence of which was known to both parties at the same moment, in such a case as the present that was an impossibility. The principles laid down by civilians as necessary to the formation of a binding contract had no reference to the modes of communication by post, which did not then exist. That mode of transacting business being now universal, its conditions must be held to be imported into all such contracts taking place between parties living at a distance from each other. The fact of this being a purchase of heritage made no difference in the present case.

This is not a metaphysical question, but a question of Scotch law, to be decided, not according as Bartolus and Brunneman would have solved it, but according to principles of equity and justice, although civil law considerations might aid in the solution of it. The opinions of those writers, Bartolus, Brunneman, Baldus, &c., who may properly be called commentators, are not of great authority. They differ from the opinions expressed by Accursius, the author of the Gloss. These writers are not of high repute.¹ As one follows the other, their opinions do not rise higher than their source, and, as mere *dicta*, are therefore of little weight. These observations, however, do not apply to the later jurists, amongst whom may be classed Pothier, Toullier, and Heineccius.

Questions like the present were treated by the commentators not so much as questions of law as metaphysical questions — the speculations of learned men, but not intended for legislation nor for the guidance of law courts. They were not used as the foundation of practical law. But it was otherwise when Pothier wrote, for the jurists of that day refer to the actual decisions of the courts. No doubt they drew from the old commentators as sources of their opinion, but they wrote upon law as a practical science, and difficulties had appeared of applying that definition *consensus duorum pluriumve voluntatum in idem placitum* in the way in which the older commentators had gone. Pothier² is obliged to confess that there is not only contrary authority in the commentators, but, in order to get rid of the difficulty, he superinduces the view he takes of the contract of sale, which is inconsistent with the general opinion to which he has come in the first part of his text, put-

¹ Butler's *Horæ Juridicæ*, p. 98; Dictionnaire Universelle, *voce* Baldus.

² Pothier, *Traité du Contrat de Vente*, 1, 2, 3, 82.

ting two cases, in the one of which the acceptor has to be indemnified, as if there had been an obligation resting on the offerer, and in the second of which he is to have implement of the offer.

Thus the question must be disposed of on principles of equity and justice. The best way to solve it would be to sacrifice the words of the definition, and make a rule applicable to the transaction, and thus do justice to both parties, unless the principles of equity and justice must yield to the definition which the jurists have given, and all definitions are dangerous when attempted to be reduced to practice. Pothier had begun to express this difficulty, and Toullier¹ agrees with it. Warnkoenig² follows Toullier. But these are not authorities on which the court ought to rely, unless no better can be got; for they are not safe, not merely because their opinions rest on an insecure foundation, merely adopting the general definition, but because there may be founded on them matter of great error, even according to their own stating of the question. Thus they put the three cases of voluntary revocation by the offerer, death, and insanity, all on the same principle. They deal with them as destroying or excluding completion of the contract altogether. Now the case of death is not so treated in modern law.³ But there is a wide distinction in fact and nature between these three things. It may be, that on death or insanity there is something which destroys previous consent; but it cannot be said that the result stands on the same principle as where a party exercises his own will and withdraws his consent. In the one case it is voluntary. In the case of death or insanity it is beyond his power. The destruction by death or insanity of a previous consent is not brought about by the will of the party. It is not a revocation of consent as civilians treat it. Consent may be destroyed, but it is not a revocation, and stands on a different principle. To satisfy this definition, it would be sufficient, without any sign or letter, or any thing to signify to the acceptor that he had changed his purpose, for the offerer to show that there was no *consensus* between his mind and that of the acceptor, and that he had changed his mind. That is not the doctrine of modern law.

We get no satisfaction out of the older authorities, but we do find guides in the more modern authorities. Sugden (Lord St. Leonards),⁴ who is an authority not to be repudiated, says that an acceptance by an owner of an offer by a letter will bind him from the time he posts his letter, although it is not received by the purchaser till the following day; and would be binding if the vendor died on the same day on which he posted his letter.⁵ See also Dart's Compendium.⁶

American authorities take up the question, not on metaphysical prin-

¹ Toullier, vol. vi. iii. 3, 39.

² Warnkoenig, p. 59.

³ Potter v. Sanders, 6 Hare's Chancery Cases, p. 1.

⁴ Sugden on Vendors and Purchasers (1851), p. 82, § 12.

⁵ Potter, as above.

⁶ Dart's Compendium of the Law of Sale, p. 118; Story on Contracts, 376, 377, § 384.

ciple, but on the principles of justice, as applicable to a different state of society from what it was when the commentators wrote.¹

The English case of Adams² is a case of general doctrine, and is so referred to in most of the subsequent cases. It was not determined on a specialty. It is referred to by the Chancellor in the Scotch case of Higgins³ as fixing that general principle. Where a party makes an offer limiting the time within which it shall be accepted, or when the offer is of such a nature that the law allows a certain time for its acceptance, the offerer is not entitled to resile or withdraw his offer within the time which he allows, or which the law gives the party for accepting it.

A party may reserve the right to retract the offer, or he may say, that although you have a certain time by law to accept, I shall also have such time to withdraw. That is his privilege, and he may so protect himself; but the party who is to accept is in a different situation. He is entitled to rely on an unqualified offer spontaneously sent to him. As in this case, where no right to retract the offer is reserved, he is not to assume that the offerer secretly intends, notwithstanding, to retract that offer. He acts upon it. He accepts it; and he does so, because on principle and in equity he is entitled to act on it. The offerer has parted with his consent by the offer. He has put it in the power of the other party to receive it. It is no longer his to withdraw. The offerer had no power to retract until there was a reasonable time for an answer.⁴

The defender pleaded: That there was not here a completed contract of sale by the letters founded on. There were certain particulars important to be kept in view.

1. The contract here attempted to be enforced bears to be a contract for the sale of a landed estate. To such a contract, by the law of Scotland, writing is indispensable, — and writing such as binds both parties at the same time. Facts and circumstances will not suffice; nor can they supply the place of writing. There must be a written acceptance subscribed and delivered. Until that is done there is *locus penitentie* on either side.⁵

2. In this case the offer requires that the offerer shall hear from the party to whom it is made, — indicating clearly that receipt of the acceptance was to be the *punctum temporis* when the bargain would be concluded.

3. Before the acceptance reached the offerer, the offer was retracted, and the retraction had reached the acceptor.

¹ Duer on Insurance.

² Adams v. Lindsell, 1 Barn. & Ald., 5th June, 1818, p. 682.

³ Higgins v. Dunlop, 2d July, 1847, D. ix. p. 1407.

⁴ Stair, i. 10, 2, 3; Erskine, iii. 3, 88; Bell's Com., i. 326, 327; Bell's Principles, §§ 73, 74, 75; Head v. Diggon, 3 M. & R. 97; Kent's Com., ii. 477; Routledge v. Grant, 18th Jan. 1828, Car. and Payne, iii. 267; Crawford, 18th Nov. 1807, F. C. M., *voce* Movables, No. 2.

⁵ Stair, i. 10, 9.

4. There is another specialty (which is disputed, and is not material in the present argument), viz., that the retraction was *de facto* put into the post before the acceptance; although in one view it may be necessary to fall back upon it, in which case the defender undertakes to prove it.

By what rule or principle is the question to be solved? The pursuers say, not by strict metaphysical principles of law, but by equity; that the court are to sacrifice the definition of the civil law, and make a rule founded on equity, as in mercantile law. On the other hand, the defender submits that the case is to be solved on the strict philosophical rule which is the foundation of the civil law and law of Scotland.

The rule of law is given in the Digest, *De Pactis*, in the words of Ulpianus,¹ who gives the ground of the rule, — that the meeting of the acts of the will must take place, like the meeting of two physical bodies, in one place. There must be *duorum plurimumve in idem placitum consensus*. To satisfy this definition, the concurrence of the wills of both or all the contracting parties must be simultaneous. When both parties are in the same place, — *inter præsentes*, — the application of the rule is easy. In such a case, in order to complete the contract, the act of the will of each must be made known to the other. If, therefore, acceptance of the offer be made by a sign which is not understood by the offerer, there is no contract. So, if the offer be made in writing, and the party to whom it is made writes an acceptance and does not deliver it, there is no contract, because there is no *concursus* of wills. *Inter præsentes*, therefore, there is no contract until the act of the will of each is known to the other.

From the same definition it may be further deduced, that consent may be given *inter absentes*, *per nuntium*, or *per epistolam*. And this is quite consistent, provided you have an equivalent to what the law requires *inter præsentes*. This is well stated by a French civilian, Pardessus, who says, “There is required not only that the offer be known to the party to whom it is made, and the acceptance to the offerer, — but that up to the moment of the acceptance being made known, when the concurrence of wills takes place, the will of the offerer shall have continued. Nothing farther is necessary then. No notification of receipt of the acceptance is required.”²

This rule solves many of the difficulties which the opposite doctrine creates, because it gives a *punctum temporis*, viz., when the acceptance is known to the offerer, which at once seals the contract. That is also the rule of our law, founded on the civil law, which is the basis of our law of sale. No doubt the rule must in certain circumstances necessarily suffer modification. Either party may have so contracted as to put themselves out of the rule, or a principle may have grown up out of commercial law and practice which modifies it. 1. The offer may be gratuitous, in which acceptance may be presumed; or 2. The offerer

¹ Ulpianus, Digest, ii. 14, 1.

² Pardessus, *Droit Commercial*, vol. ii. pp. 233 and 250 (2d ed.).

may agree to remain bound for a certain defined time; or 3. Circumstances or usages of trade may introduce such a condition by implication. But apart from these specialties, such is this rule — giving the offerer a right to retract till the acceptance is known to him.

The highest and best authorities on such a matter are not the civilians or the commentators on the Roman law, but jurists properly so called, who treat of the law of nature. These writers are all clear, that, to make a completed contract, acceptance must be known to the offerer.¹ Again, other things besides revocation prevent or obstruct the completion of the contract. The death or insanity of the offerer before acceptance is known to him will have this effect, and are placed in the same category with retraction by all the writers. Wherever matters are in such a situation that death or insanity of the offerer prevents the completion of the contract, there revocation does so. Yet in such a case there is only implied retraction. In the present case the retraction was direct and explicit.

In this matter the law of England is of no authority. Among other differences, the law of England holds that death or insanity does not put an end to the contract. The law of Scotland holds that it does. And so, indeed, in the whole law of sale, the English law differs from ours. Then there is a marked difference between the two laws as to mandate. The law of England holds that death of the mandant immediately puts an end to the mandate, whether it be known to the mandatory or not. The law of Scotland holds differently. Therefore, as an authority in this case, the law of England must be rejected.

With regard to our own law there is not a vestige of authority in the writers on Scots law adverse to the doctrine of the civil law already quoted, or to the writers on the law of nations. The case of Crawford² has nothing to do with the doctrine of mutual contract. It was a case of specific appropriation. And as to the analogy of mandate — although analogy is a dangerous mode of reasoning — the distinction must be kept in mind between the case of a contract between mandant and mandatory, and of contracts between mandatory and third parties. In regard to the former the law is peculiar.³ As to contracts between mandatory and third parties there is no peculiarity; in the law of mandate the general rules of the law of mutual contract apply.

Then as to the commentators on the civil law, their authority is uniform. From Bartolus, who in his age was considered the *speculum et lucerna juris*, and is so called by Cujacius, downwards, the rule is laid down without exception as above stated. But it is said that, according to modern writers, the definition of strict law is to be sacrificed, and the principles of equity are to be introduced. That may be true as to the

¹ Grotius, ii. 11, § 15; Pufendorff, iii. 6, § 15; Heineccius, *Collected Works*, vol. viii. p. 284; and Wolfius (*Vattel's Abridgment*), vol. iii. §§ 714, 715.

² Crawford, 18th Nov. 1807, *Mor. App. i., voce Movables*, No. 2.

³ Lord Glenlee's opinion in *Pollock v. Paterson*, 10th December, 1811, *F. C.*, p. 378.

common law of England, but not so as to the law of any other civilized country in Europe. Besides, what is meant in this sense by principle of equity but consuetude making law? It is not that equity is to be allowed to control the law, and there is no ground for equity to be brought in here. Modern civilians are all in favor of the rule.¹

Now here there is a proposal made, through the medium of the post, to buy a landed estate. That proposal is retracted. No damage is alleged or claimed. The only counterpart of this offer, so as to make a contract, is acceptance. But acceptance is ineffectual until delivered — apart from the question of the knowledge of that acceptance, delivery is essential — to make it binding on the acceptor. Accordingly it is said to be delivered by being put into the box at a post-office, from which it could not be got back. The post-office is to be regarded merely as a messenger. The post-office regulations are merely for public convenience, and may be altered. They are not matter of law, but merely an accidental fact. But a letter may be got back, or may not reach its destination; or it may be anticipated by a swifter messenger, or there may be other modes of conveying intelligence contradicting the letter, or destroying its contents. The decision in the case of the Countess of Dunmore² negatives the doctrine that the posting of an acceptance is *eo ipso* completion of the contract. Therefore acceptance is not binding on the acceptor until it reach the party to whom it is addressed. It therefore could not, during that interval, bind the offerer. He had still right and power to resile. An offer is not an offer until it is received. An acceptance is not an acceptance until it is received. And the moment at which the contract is completed is that at which the acceptance is received by the offerer; because until then there is no expression of the acceptor's will effectual to bind him. On these grounds the defence that there was here no completed contract ought to be sustained.³

LORD PRESIDENT. This action has been brought by the trustees of Mr. Keir of Renniston against Mr. James of Samieston to obtain implement of a contract said to have been completed by certain letters or missives for the purchase and sale of the estate of Renniston.

The facts as averred are few and simple. On 26th November, 1853, Mr. James wrote, and transmitted by post from the country, a letter addressed to Mr. Thomson (one of the pursuers) making an offer or proposal for the purchase of Renniston at 6400*l*. That letter was received by Mr. Thomson in Edinburgh on the 28th of November, and was acknowledged on the same day by a letter in which Mr. Thomson said he would communicate with the parties, and give their decision

¹ Pothier, *Traité de Vente*, i. 2, 3, § 32 (sub.); Toullier, *Droit Civil*, vol. vi. p. 745, § 714; Pardessus; Warnkoenig, vol. ii. pp. 69, 70.

² *Alexander v. Countess of Dunmore*, 15th Dec. 1830.

³ See also Pandects, i. 14, 2; Grotius, *De Jure Belli et Pacis*, ii. 6, 1, 2; Pufendorff, iii. 6, 15; Brunneman; Bartolus, Com. on lib. xv., Digest, p. 94 of folio; Sugden's Vendors and Purchasers, p. 116; Story on Sale, 103.

with the least possible delay; and on 1st December Mr. Thomson posted at Edinburgh a written acceptance of Mr. James's offer. That letter of acceptance was addressed to Mr. James, and was received by him in the country, in due course of post, on 2d December. There is no question raised as to the formality of these writings, or as to their sufficiency to constitute a binding contract for the purchase and sale of Renniston, if the acceptance had been received by Mr. James before he had done any thing to withdraw the offer. But before Mr. James received the letter of acceptance he changed his mind; and on the 1st of December (being the day before the acceptance reached him) he posted at Jedburgh a letter addressed to Mr. Thomson recalling the offer. That letter was received by Mr. Thomson in Edinburgh on the 2d of December. As to all these facts the parties are agreed. The defender, Mr. James, makes some additional averments which are not admitted by the pursuers, and the relevancy of which is disputed. These additional averments are, — 1st, That the letter of recall was posted at Jedburgh, not only before the letter of acceptance was received, but before the letter of acceptance was posted at Edinburgh; and 2d, That the letter of recall was delivered to the pursuer at Edinburgh before the letter of acceptance was delivered to the defender in the country. It is contended for the defender, that either or both of these additional facts, if established, will be a sufficient defence against the action. The pursuers, on the other hand, dispute the relevancy of these averments; and they demand judgment in their favor on the undisputed facts of the case without further inquiry. The Lord Ordinary pronounced an interlocutor, of date 13th June, 1854, whereby he refused a motion made by the pursuers to have judgment pronounced in their favor without further inquiry; and directed that the case should be put in train for inquiry as to the first of the two averments to which I have alluded, viz., the alleged priority of posting. It does not appear that the other averment was then so much, if at all, insisted on. That interlocutor of the Lord Ordinary in effect sustained the relevancy of the averment as to priority of posting, and of the defence founded on that averment; and the Lord Ordinary in a note explained the grounds on which he proceeded in taking that view of the case. The interlocutor of the Lord Ordinary having been submitted to review, and counsel having been heard against the interlocutor and in support of it, the court, after deliberation, thought that the case had not been discussed in all its bearings quite so fully as was desirable, and it was set down for farther argument. In the course of that farther argument the case was discussed very fully and with remarkable learning and ability. Very great research was exhibited in bringing before us authorities, ancient and modern, and the *dicta* of writers not only of our own country, but of Continental Europe and of America. The ground then taken by the defender was not limited to the alleged effect of priority of posting on which he had first rested his defence. He took up also, and apparently with not less confidence, the other ground

I have alluded to, namely, that his letter of recall had been delivered to the pursuers before their letter of acceptance had been delivered to him, as an additional or separate ground for holding that he was not bound by the acceptance.

The question thus raised (if the facts of the case are such as to present it pure for decision) is one of great importance, and of no small difficulty. I own that, at the conclusion of the last argument, the impression I had previously entertained in favor of the pursuers was materially weakened, especially by the argument submitted to us regarding the effect to be given to the fact, if established, that the letter of recall reached its destination before the letter of acceptance reached its destination. The subsequent consideration I have given to the case has however confirmed my first impression in regard to the general question of the completion of the contract by acceptance. But I have still some hesitation in holding that the case is free from specialty on one point, to which I shall presently advert, arising out of certain expressions in the defender's offer of 26th November, which may perhaps admit of being regarded as of the nature of special condition.

Assuming at present that there is no specialty in the case such as can materially affect the general question that has been raised and argued, I shall state the grounds on which I have formed the opinion, that the offer of purchase made by the defender in his letter of 26th November was effectually accepted by the pursuers' letter of 1st December, and that the contract was thereby completed.

The subject-matter of the transaction being the purchase and sale of land, I hold that writing on both sides was necessary to complete the bargain. But I hold that the two writings—the offer and acceptance in question—were sufficiently formal for that purpose; and that if the letter of acceptance had been delivered to the defender by post before he took any step towards the recall of his offer, the contract would have been complete, and the pursuers would have been entitled to enforce implement of it. That proposition I do not understand to be disputed. It was assumed in argument on both sides, and therefore it is unnecessary to refer to any authority in support of it. The real question in issue between the parties is, whether the offer was recalled before it was accepted. The defence against the action is, that the offer was recalled before it was accepted.

I hold that a simple unconditional offer may be recalled at any time before acceptance, and that it may be so recalled by a letter transmitted by post; but I hold that the mere posting of a letter of recall does not make that letter effectual as a recall, so as from the moment of posting to prevent the completion of the contract by acceptance. An offer is nothing until it is communicated to the party to whom it is made, and who is to decide whether he will or will not accept the offer. In like manner I think the recall or withdrawal of an offer that has been communicated can have no effect until the recall or withdrawal

has been communicated, or may be assumed to have been communicated, to the party holding the offer. An offer, pure and unconditional, puts it in the power of the party to whom it is addressed to accept the offer, until by the lapse of a reasonable time he has lost the right, or until the party who has made the offer gives notice, — that is, makes known that he withdraws it. The purpose of the recall is to prevent the party to whom the offer was made from acting upon the offer by accepting it. This necessarily implies precommunication to the party who is to be so prevented.

The argument for the defender upon this branch of the case was rested upon what I cannot help regarding as a strained application of a rule or maxim, sufficiently sound in general application, but which cannot be applied in the most strictly literal sense that the words admit of. It was contended, that as the offerer had changed his mind, and had posted a letter announcing that change before the offeree had declared his mind by posting his acceptance, the intention or consent to purchase cannot be held to have continued until the consent to sell was declared, and consequently that at no one moment of time was there *in idem placitum consensus atque conventio*, which is said to be essential to a paction. It was argued, upon a rigid application of that definition, that the completion of the contract was interrupted by change of mind, though not yet communicated, just as it would have been by the death or insanity of the offerer, and that all these three events are classed together by some writers as being alike revocations of the offer. Death or insanity may prevent the completion of the contract as effectually as the most complete revocation, but they are not properly revocations of the offer. They are not acts of the will of the offerer, and their effect does not rest upon a supposed change of purpose. They interrupt the completion of the contract, — that is, the making of the contract, — because a contract cannot be made directly with a dead man or a lunatic. The contract is not made until the offer is accepted; and if the person with whom you merely intend to contract dies or becomes insane before you have contracted with him, you can no longer contract directly with him. You cannot, by adhibiting your acceptance to an offer, and addressing it to a dead man or a lunatic, make it binding on him, whether his death or insanity be or be not known to you. In such a case there is no revocation, in the correct use of the word, but there is an interruption — an effectual obstacle to the completion of the contract, equivalent in result to a revocation, though operating by very different facts and very different principles. Revocation or recall is an act of the offerer, by which he communicates his change of purpose, and withdraws from the offeree the right he had given him to complete the contract by acceptance. Having communicated his purpose to purchase, the offeree is entitled to regard that purpose as unchanged until a change is communicated. He has acquired a right, which he retains until it is withdrawn from him by a communication from the party who conferred it. If he exercises the

right by a completed act of acceptance of the offer before notice has reached him, or ought in ordinary course to have reached him, the contract will be binding, although a change of mind on the part of the offerer had taken place, and although he had taken a step towards communicating that change of mind by writing a letter, or even putting it into the post-office. In a great many cases the maxim that there must be a concurrence of will at the moment of completion of the contract cannot be rigidly or literally applied. The very opposite may be the fact. Although one cannot, by accepting an offer, bind a dead or insane person, he may bind an unwilling person, one who has altogether changed his mind. Such cases are not unfrequent. If an offer bears that it is to be binding for a certain number of days or hours, the offerer may repent before the lapse of the given time, and yet at the end of it may find himself unwillingly bound; or if an offerer changes his mind, but does not take the proper steps to have his change of mind conveyed to the offeree, — either writes no letter, or writes a letter which he omits to send, or sends it by mistake to a wrong place, — he may find himself unwillingly bound. Other cases may be figured. Mere change of mind on the part of the offerer will not prevent an effectual acceptance, — not even although that change of mind should be evinced by having been communicated to a third party, or recorded in a formal writing, as for instance in a notarial instrument. In all these cases a binding contract may be made between the parties without that *consensus* or *concursus* which a rigidly literal reading of the maxim or rule would require.

Upon the grounds now indicated, I hold that the mere putting of the letter of recall into a distant post-office before the acceptance was sent off did not put an end to the offer and exclude the power of the offeree to bind the offerer by accepting the offer. I hold that a letter of recall has no effect till the recall has become known to the offeree, or should in due course have become known to him. In the present case the letter of recall reached its destination on 2d December, and on that day became known to the pursuers. The letter of acceptance had been posted on the preceding day, the 1st of December; but it is averred that it had not reached its destination when the recall was received on the morning of the 2d. I hold that, in the circumstances averred, the delivery and receipt of the letter of recall did not interrupt or prevent the completion of the contract. I do not think that the principle to which I have referred, as that applicable to the recall of an offer, applies equally to the acceptance of an offer; or that every thing which must be done, in order to effectuate the recall of an offer, must, in like manner, be done in order to give effect to the acceptance of an offer. The two things are in their nature different. The one consists in effectually undoing something that the party himself has already done, and which binds him unless it is effectually undone; the other consists in merely acceding to a proposal made. What it is that the acceptor must do in order to make his acceptance effectual, and to put it out of

the power of the offerer to recall his offer, depends on circumstances. Some things he must do. He must make his acceptance in writing, and he must send forth or give up that writing to or for behoof of the offerer. It is not enough that he commits his acceptance to writing and locks it in his own repositories; and, on the other hand, it is not necessary that he shall deliver it personally to the offerer. When an offer is made by letter from a distance through the medium of the post, the offerer selecting that medium of transmission authorizes and invites the offeree to communicate his acceptance through the same medium. If the offeree avails himself of that medium of communication, and transmits his acceptance, properly addressed, through the post-office, and if the acceptance reaches its destination in the due and regular course of that medium of transmission, I am of opinion that the act of acceptance was completed by the putting of the letter into the post-office; and that a letter of recall, which did not arrive till after that act, cannot be held to have interrupted the completion of the contract. By putting the letter of acceptance into the post-office, the offeree did just what he was invited to do, and all that it was incumbent on him or possible for him to do in the way of acceptance, by the mode of communication which he was authorized, if not invited, by the offerer to adopt. This appears to me to be the general rule, and it is so laid down by Mr. Bell in his Commentaries, i. 327, and by the House of Lords in the case of Higgins. Mr. Bell says: "It is the act of acceptance that binds the bargain, and in the common case it is not necessary that the acceptance should have reached the person who makes the offer." In the case of Higgins, 6 Bell, 195, the Lord Chancellor laid down the same law, and held that the contract was completed by the posting of the acceptance. If the contract was completed by the posting of the acceptance, a letter of recall received afterwards could not annul the contract so completed. I think that the fair import of these authorities is, that an offer imports an obligation on the offerer conditional on acceptance; and that in the general case, if the offer has been sent by post, the offeree effectually avails himself of it, purifies the condition, and makes the bargain binding on the offerer by posting his acceptance. There may be extreme or extraordinary cases in which the offerer might not be bound by the fact that the letter of acceptance had been put into the post-office, as, for instance, if the mail was totally lost, and the letter never reached its destination; and the offerer, after waiting a reasonable time, and believing that the offer had not been accepted, sold the goods or property in *bona fide* to another. These are extraordinary occurrences, over which neither party has any control, and which neither of them was bound to anticipate or contemplate. Reasonable time may be given to cover such casualties or contingencies, but more cannot be required. The general rule, as laid down in the case of Higgins, is, that the writing and posting of the acceptance completes the contract so as to make it obligatory, and I think that the rule so laid down rests on principle.

The authority of Lord Stair was appealed to by both parties, but I think that inferences were deduced from the expressions used by that great authority which were not within the contemplation of the writer, and it is very certain that he had not in view that mode of making a contract by interchange of post letters which is so common in the present day, and which was adopted by the parties in the present case. At i. 3, 9, after treating of promises, Lord Stair says, "An offer hath the like implied condition of the other party's acceptance;" and again, "In mutual contracts the one party subscribing is not obliged till the other subscribe as being his acceptance." He is obviously there talking of a formal mutual contract in one writing to be subscribed by both parties. Again at i. 10, 6, he says, "If the promise be pendent upon acceptance, and no more than an offer, it is imperfect and ambulatory, and in the power of the offerer till acceptance." He does not there explain what constitutes acceptance; but somewhat further on, after noticing the formalities by which pactions were concluded among the Romans, and that with us writing is substituted in matters of importance, he goes on in § 9 to say, "In all which there is *locus pœnitentiæ* even after the agreement, and either party may resile till the writ be subscribed and delivered;" and one of the annotators on Stair (the present learned professor of law) in his note on this passage says, "Till such writings shall be exchanged, either of the parties is entitled to recede from the agreement, the rule being that, in regard to such matters, there can be no final or binding agreement till it shall be vouched by a regular and probative writing." From these and other passages I deduce the doctrine, recognized indeed by all our writers and authorities, that a simple offer is revocable till it be accepted; and that where writing is necessary, the writing, to make it available to the party in whose favor it is conceived, must be subscribed by the maker of it; and that even after subscribing it, the maker of it may withhold delivery, in which case also it will not be available to the opposite party; and although Lord Stair, in some of the passages to which I have referred, and especially in the passage regarding *locus pœnitentiæ*, is treating more particularly of dispositions and bonds, and such writings, following upon a previous agreement, I think that the principle is applicable to the written acceptance of an offer made in a separate writing, although there should not have been any previous agreement. But on these passages in Stair, I venture to make two observations: 1st, That he is treating of the case of the party who himself makes the writing and subscribes it, and of the requisites to initiating any obligation to be thereby imposed on him; and, 2d, That, although he uses the word "delivered," he does not define that word, or say what is necessary to constitute delivery. He does not say that the writing must be delivered by the hand of the writer into the hand of the opposite party. That certainly is not necessary. It is not even necessary that it be delivered to the party in whose favor it is conceived; it may be placed in the custody of a third party, and then the question of delivery or

non-delivery may depend on this other question, *quo animo* was it placed there? The doctrine means that while the maker of the writing abstains from handing it over, retains it in his own custody, his act of acceptance (if the writing be an acceptance) is not complete. Lord Stair certainly does not say that putting the writing into the post-office addressed to the offerer completes the contract, but as little does he say the reverse. He does not write in contemplation of such a mode of transacting. If the question is to be solved by the inquiry *quo animo* was the letter delivered into the custody of the post-office, there can be no doubt that it was so delivered for behoof of the party to whom it was addressed. If the letter constituting the offer had been sent by a messenger, and had requested that the answer should be returned by the bearer (which, I think, is implied in an offer sent by post), and if the offeree had accepted the offer, and delivered a sealed letter of acceptance to the bearer of the offer, and if, while the bearer was on his journey back with the acceptance, another messenger had brought a letter of recall of the offer, I think that the recall would have been too late to interrupt the completion of the contract.

In support of the contention that the acceptance was not complete till the letter of acceptance reached its destination, it was urged that until that event the acceptor might have interrupted or prevented the completion of the contract by recalling or revoking his acceptance, — that he might have sent the recall by the same or a more rapid conveyance, so that it would be received as soon as, or sooner than, the acceptance; and upon the authority of the case of Lady Dunmore, it was argued that if this had been done, the acceptance would not have been binding. Then, combining that proposition with the general rule that in matters of contract both must be bound or neither, it was argued that, as the acceptor was not irrevocably bound till his acceptance was received, neither could the offerer be bound. I think that here the argument for the defender partook of ingenious subtleties, and a straining of general rules to extremes. In the first place, the authorities we have on the subject of the power of an acceptor to revoke or recall his acceptance are very scanty, if indeed the doctrine of revocation or recall is at all applicable to an acceptance, which I much doubt. In strict language recall or revocation, which applies to an act already complete, but which the party is entitled to annul, cannot be applicable to an acceptance, which, once it is fully made by the acceptor, completes the contract, and leaves nothing more to be done or agreed to by either party. In the second place, I think there is a manifest distinction in principle between the mere abstaining from doing a thing which would be necessary to be done before you could be held to have completed your act, and that conduct which consists in a subsequent active interference set on foot for the purpose of undoing or counteracting the legal consequences of a thing you have already done, to the full extent that was required of you. When the letter of acceptance was put into the post-office there was nothing more to be done by the ac-

ceptor personally; whether he could interfere so as to counteract or annul the legal consequences that would have flowed from what he had already done if he had thenceforth remained inactive, may be a question, and may depend on circumstances, and on the character of the interference; — we have no such question here. But in the case of Lady Dunmore effect is said to have been given to something of that kind as sufficient to prevent the completion of the contract; that was a very peculiar case. In the first place, the correspondence there was not between the principals directly; there was an interposed person acting in some respects for both. In the second place, the two letters from the same party were received at the same time, the second undoing what the first proposed to do; and it appears to have been held that both were to be regarded as one writing, — the second letter as a postscript to the first, — and that so regarding them, the construction of the writing, taken as a whole, was hostile to the idea of a contract. But where there is no such postscript, no question as to the writing which is to be taken as the answer to the offer, no interference by the acceptor to undo or explain what he had already done, — when he has given away his written acceptance to the messenger to whom he was invited or authorized to intrust it, and has done so not for the purpose of being retained as for himself, but for the opposite purpose of being held for the offerer until given into his own hands; when that purpose has never been departed from, I think that we are out of the case of Lady Dunmore, and of any principle on which that decision can be held to have proceeded.

These are the grounds on which I think that if the offer of 26th November is to be regarded as free from any condition except the implied condition of accepting, the acceptance posted on 1st December must be held to have completed the contract, and that the letter of recall, which was in due course received the day after the acceptance had been posted, did not interrupt the completion of the contract, although the recall may have been posted before the acceptance was posted, or may have been received before the acceptance was received.

But I have said that there are expressions in the offer which may perhaps admit of being read as a condition. I allude to the last sentence, which is thus expressed: "Upon hearing from you that these terms are to be acceded to, the form necessary in such transactions will be gone through." These words appear to be suspensive and conditional upon hearing that the terms of the proposal are to be acceded to, and it becomes a question whether that suspensive condition is, or is not, applicable to the contract of sale. If it be applicable to the contract of sale, I think that there is authority for holding that the power to recall the offer continued until the actual receipt of the answer acceding to the terms, and consequently that if the letter of recall reached its destination before the letter of acceptance was received, effect would be due to the recall. In that view the defender's averment that his letter recalling the offer was despatched and reached its

destination before he received Mr. Thomson's letter acceding to the terms of the offer, would, I think, be a relevant averment, and if proved or admitted, would be very material in the defence. But I doubt whether the expressions to which I have alluded can be held to apply to the contract of sale. I think they have reference rather to those formal proceedings which were to be consequent on the contract of sale, and which in all such transactions are necessary to complete the formal transference of the property to the purchaser, such as the executing of a formal disposition or deed of conveyance by the seller, &c. That I take to be the true meaning of the sentence; and when so understood, it does not raise any such specialty in the case as can affect the opinion I have expressed. I therefore think that judgment should go in favor of the pursuers.

LORD IVORY. I have given very anxious attention to this case, and the result is, that I am of the same opinion as your Lordship. Perhaps I should have contented myself with announcing that entire concurrence with your Lordship's opinion, because I not only agree in its result, but in the whole argument by which it is supported. I shall not attempt to detain the court by going over all the notes I have taken, but I shall endeavor to bring out the substantial view of the law as it has occurred to me.

With regard to the facts, it appears to me that there are only three of importance in the general question: 1st, That there was an offer to purchase an estate on the 26th of November; 2d, That there was an acceptance of that offer on the 1st of December; and, 3d, That there was a retractation dated the same day, but not reaching the acceptor till his acceptance had been posted. There is no other fact of any moment. It was a condition that this bargain was to be conducted by means of correspondence, and it is that circumstance which has occasioned the difficulty of the question. The question is simply this: Where an offer of sale has been accepted, no notice of the revocation of the offer having at that time come to the acceptor's knowledge, is there a completed contract by that offer and acceptance? or, whether the fact of acceptance may not be rendered ineffectual by an act of revocation by the offerer before the acceptance has reached him?

It is necessary, before coming to the question of revocation, to ask and to decide precisely what it is that constitutes the contract of sale when entered into in such circumstances, what is necessary for its completion, and what the *punctum temporis* at which it is to be considered as completed.

With reference to the argument we had as to the *punctum temporis*, if the contract is not completed till the acceptance has been received and notified, the power of revocation must exist till then; but if the completion of the contract rests upon the act of acceptance, it is this act that completes the contract, and from that moment there can be no retractation. It is perhaps an inaccurate expression to speak of revocation or retractation; this power comes more within the meaning of our words *locus penitentiae*.

In discussing the question, I think the parties ran into confusion by mixing up what constitutes the contract and what empowers one or other of the parties to get quit of it or prevent its completion.

There is no doubt of the correctness of the general maxim, that in all mutual contracts there must be *consensus in idem placitum*, — that is to say, both parties must be agreed as to all conditions essential to the contract; otherwise the one party would have in view one contract, and the other a different one. So also both parties must be bound or neither, that is, to such conditions as have been agreed upon, so that one shall not be bound to any one thing which is intended to be mutually binding, and the other free. It does not, however, follow that there may not be stipulations and conditions as to which one may be bound, and to which it has never been intended that the other should be bound. In order to explicate this phase of the case, we must inquire what is the meaning of the parties, and the mutual though diverse obligations here made, these obligations being the considerations given for each other.

As to what was further maintained, that there must be a simultaneous concurrence of the two wills, it must not be taken too absolutely, and much fallacy lurks in the argument used on this head by the defenders. For example, *inter absentes* the offer must necessarily be of one date, and the acceptance of another. It is the *concursus* of both of these which forms the contract, and the question is, — When does this *concursus* take place? Now, naturally speaking, there is no offer *quoad* the acceptor until the letter containing it reaches him. An offer by letter is, in some sort, *ad longum manum*, and until it reaches its destination there is only one will at work. If acceptance is then made, there is an instant *concursus*, and the offer hitherto in suspense takes effect, — the acceptance, when the offer comes to hand, merging with it into the completed contract.

But, according to the defender, there is no contract till the acceptance reaches back to the offerer. If so, when is the acceptor bound? It is his act of acceptance that binds him; but if the offerer be free till that acceptance reaches him, how is the acceptor to know whether he is bound at all, or when? And if the acceptor also be free till his acceptance has reached the offerer, how does the offerer know that his consent to the contract has so long continued?

On the contrary, if the acceptor be bound from the moment that he accepts, while the offerer remains free for a course of post later, how is this more consistent with the theory of simultaneity than the view which holds that the offerer is bound at the date of the acceptance? Accordingly, almost all the authorities concur in this, — that when the offer continues to be a subsisting offer at the date of the acceptance, the *concursus* which then takes place between the two matures the transaction into a completed contract.

It is clear to me, therefore, that had there been no retractation the sale would have been complete on the 1st of December. Upon this

footing, the question was raised before the Lord Ordinary, whether the retraction or the acceptance was prior in date. Had notice or delivery of the acceptance been supposed to be necessary, the case would have been wholly with the defender. In support of this view it is said that every part of the mutual contract, in order to take effect, must have *suum signum*; that the inner act of one mind is nothing in its relations and bearing upon another mind; and that in law an act of the mind, uncommunicated, is no act at all.

I see no reason to dispute these propositions, if properly understood. But how do they apply to the present case? The offer, it is admitted on all hands, is nothing till it reaches the other party; it only becomes an offer by communication. The acceptance, according to the above propositions, must be in *pari casu* so long as it remains *sine signo suo*. But is it really in that predicament here? There is here constructive delivery. If it had been delivered to a messenger of the offerer, sent for that purpose, the case would have been clear. If delivered into the hands of a third party, as *quasi* trustee, it would also have been clear. Now, delivery into the post-office is in its circumstances clearly analogous. The post-office is in some sort a middleman between the parties, and has a recognized effect in other transactions.

In the second place, as to the effects of the retraction taking place before acceptance, there can be no doubt that a party may in a certain sense recall his offer, so long as there is no contract, — that is to say, so long as it is a mere offer; but after there is a complete contract, he cannot do so. Thus, if the preceding reasoning is sound, and if the contract was completed by the act of acceptance, though unknown to the offerer, the latter cannot revoke after the date of the acceptance.

This, however, is not the *species facti* which occurs here. The revocation bore as its date, in point of fact, the same day as the acceptance. The former contention related to the question, which of the two was earliest despatched. But postponing that question for the present, which is at any rate one of fact, the question now discussed has rather been, whether the retraction could in law have any effect before it was received by the acceptor. If it had not, it is plain that the acceptance was good, because the retraction was certainly not delivered until after the act of acceptance took place, according to the view of the latter which I have just supported.

This state of the question renders it necessary to resume consideration of the nature and effects of the offer. Now we have seen that the offer is *habile*, as such, only upon its receipt, and the party sending it must be held to be aware that, from that date alone could it have either meaning or operation. He must therefore have intended that it should subsist up to that date. He could certainly have given the acceptor a specific time for consideration; and it is no objection to say, that during this time he is held to be bound while the other is free. It is the same relation of parties as that which accrues in cases of sale and return, or of taking upon trial. But if *per expressum* such a state

of matters may arise, it may do so no less by implication. Now, *inter absentes*, the existence of such implication is clearly rested upon principle. It arises necessarily *ex naturâ rerum* in such circumstances, and if it were otherwise commerce would be rendered impossible.

The tendency of courts and writers on jurisprudence in modern times has accordingly been all in this direction. Even the older authorities are divided, and many of their *dicta* appear to be ill-considered, amounting to little more than an *ipse dixit*,—an assertion without reasoning. As to Pothier, the exceptions to his rules, which he admits, themselves are destructive of his rules. He admits that damages may be due, if an offerer changes his mind; but why give damages if no wrong is done? And no wrong can be held to be done, if an offer is a thing essentially subject to recall as much as if the power of recall were an expressed condition of it when made.

But if I offer to sell, there can be no room for damage, provided between my offer and the ratified acceptance I have not changed my mind. *A fortiori*, as to actual shipments being binding, this is an effectual evidence of acceptance, which is the view of Troplong and other writers. The whole question resolves, in every other shape which it can take, into a matter of evidence,—whether or not a *jus quæsitum* has been created in favor of the offerer.

In questions of mandate consent is held to continue if once given, and the mandatory is instantly entitled to act and to bind his principal, and a revocation of the mandate goes for nothing. So much so, that in this case, had the sale been to be effected through a mandatory, it would have been perfectly good. The same holds good in the case of orders to commission agents, and orders to ship goods. In all these cases consent is capable of being recalled before it has been acted on, but after this has taken place a *jus quæsitum* has been created.

Accordingly, as in the first branch of the question, I hold that the acceptor is bound from the date of his acceptance, and that, from that date, he is entitled to incur charges, to purchase, if necessary, in order to fulfil, to borrow, or to alter the most important arrangements on the faith of the contract as completed.

As to the specialties of this case, the words “upon hearing from you” might be argued to imply a condition affecting the contract. But it does not appear to be so. These words rather imply that the agreement, previously complete as the [a] personal obligation, would be carried out into a real contract as soon as the other party should write.

In regard to its being a sale of heritage, I shall merely remark that we are here entirely in the question of a personal contract. The principles which hold good as to the effect of revocation are not peculiar to the sale of either heritage or movables. They are common to all consensual contracts, and there is here no ground for distinction or exception.

LORD CURRIEHILL. The conclusion of the summons in this case is, that the defender should be ordained “to implement his part of the

following letters or missives, — viz., letter or missive of offer from the defender to the said Alexander Thomson on behalf of the pursuers, dated 26th November, 1853, offering or agreeing to purchase the lands of Renniston at the sum of 6,400*l.* sterling, payable at Whit-Sunday, 1854; and letter or missive from said Alexander Thomson on behalf of the pursuers to the defender, dated 1st December, 1853, accepting of said offer of 26th November, 1853,” and that by accepting of a disposition of the subjects and paying the price. In the record, accordingly, the contract of sale, upon which this demand is founded, is stated to have been entered into by the parties having interchanged these documents. And the plea in law in which the pursuers embody the ground of their action is, that “the correspondence between the parties, and particularly the letters of 26th November and 1st December, 1853, constitute a valid contract of sale.” The defender does not deny that he made the offer contained in the former of these letters, and that the latter of them, if it had been delivered to him *tempestive*, would have been a binding acceptance of that offer; but maintains that that acceptance did not take place until after the offer had been effectually retracted by him.

In considering the question thus raised, two things should be kept in view: 1. That the subject of this alleged contract consisted of an heritable estate; and consequently that, according to a familiar rule of the law of Scotland, it was essential to the validity of such a contract not only that the parties should be fully agreed as to the terms of the bargain, but that their consent should be embodied in writing, — the mental act of volition being ineffectual, unless it be indicated in writing according to certain established rules (Erskine, iii. 2, 2); — and, 2. That this alleged contract of sale is said to have been constituted not by a unilateral deed, but by two different writings, of which one was written by the defender in Roxburghshire on the 26th of November, and the other was written five days later by the pursuers’ agent in Edinburgh, and that there is no allegation that such contract was entered into by any act or deed whatever other than the interchange of these letters. Such being the nature of the present case, it must be distinguished from other kinds of cases which are subject to the operation of different rules, — such, for example, as contracts of sale of goods, which may be constituted by mere consent, without writing or any other security, — or mere promises, which may become effectual without acceptance by the donee, — or mere orders, which become effectual by being obeyed or performed without any other acceptance. The contract which it is the object of the present action to enforce, is not alleged to belong to any of these classes of transactions, but is said to have been entered into only by the defender sending a missive of offer to the pursuers, and by the latter five days afterwards sending a missive of acceptance to the former; and the question must be decided according to those rules of law which are applicable to a case of that kind.

The first step in this inquiry is to ascertain what were the relative

positions of the parties when the defender had sent to the pursuers his missive of offer of the 26th of November, and before either the retraction by the one party or the acceptance by the other was written. And one thing at least is clear enough, that so long as matters remained in that state there was no concluded contract of sale between the parties, and no binding obligation was actually incurred by even the offerer to receive a disposition of the subjects and to pay the price. The trite rule of law as to this matter is thus stated by Lord Stair, i. 3, 9, when treating of implied conditions in contracts: "An offer hath the like implied condition of the other party's acceptance (and in that it differs from an absolute promise), so that if the acceptance be not adhibited presently, or within the time expressed in the offer in which the other party hath liberty to accept, there ariseth no obligation, as was found 25th June, 1664, Allan *contra* Collier." And the same author afterwards (i. 10, 3) thus discriminates this implied condition in offers from other things with which it is sometimes confounded: "We must distinguish betwixt promise, pollicitation or offer, paction, and contract, — the difference amongst which is this, that the obligatory act of the will is sometimes absolute and pure, and sometimes conditional, in which case the condition relates either unto the obligation itself, or to the performance, such as are the ordinary conditional obligations which, although they be presently upon the granting thereof binding and cannot be recalled, yet they are only to be performed and have effect when the condition shall be existent; but when the condition relateth to the constitution of the obligation, then the very obligation itself is pendent till the condition be purified, and till then it is no obligation; as when an offer or tender is made, there is implied a condition that before it becomes obligatory the party to whom it is made must accept." And in contradistinction to such an offer his Lordship, in the next section (i. 10, 4), says: "A promise is that which is simple and pure, and hath not implied in it the acceptance of another."

But the defender's offer to the pursuers, although it did not create a binding obligation on him so long as nothing followed upon it, had then the twofold effect of conferring one power upon the pursuers, and of reserving another power to the defender himself. On the one hand, the power which was thereby conferred upon the pursuers was to accept the offer at any moment, within a reasonable period, so as to bind themselves to perform the counterpart of the proposed contract of sale. That was an implied condition of the offer, and there was placed in the pursuers the option of purifying that condition by accepting the offer within due time. As the period of time which was allowed for acceptance is not stated in the offer, it might have been a question of some nicety how long it was to endure; but that question is not raised in the present case.

On the other hand, the power which the defender reserved to himself was to retract that offer, and thereby put an end to it at any moment, so long as the pursuers did not exercise their power by

accepting of the offer to the effect above mentioned. That such an implied power is reserved to the offerer is another fundamental principle in the Scottish law of mutual contracts, which is thus expressed by Lord Stair, i. 10, 6: "If the promise be pendent upon acceptance, and no more than an offer, it is imperfect and ambulatory, and in the power of the offerer till acceptance; and if he die before acceptance, it is revoked, as a commission or mandate, which necessarily imports acceptance, and expires by the mandator's death." The implied power of retraction, thus reserved by the law itself to an offerer, may indeed be competently renounced by him; and this is sometimes done by his stating in his offer that he will be bound by it only for a certain definite period of time. But as the defender in his offer did not, in this or any other way, renounce his implied power of retraction, it remained with him.

Holding then, that at the time when the defender's offer of 26th November reached the pursuer Mr. Thomson, the positions of the respective parties were, that the latter had the power of concluding the bargain by accepting of the offer, so as to bind themselves to perform the counterpart thereof, — but that so long as they did not effectually exercise that power, there remained with the defender a reserved power to retract his offer, — the question comes to be, Which of these powers was first effectually exercised? The solution of this question has been rendered puzzling by the circumstance, that both the retraction and the acceptance were transmitted through the post-office, and they crossed each other in the course of their transit. According to the statements of the defender (the truth of which must be assumed in this discussion as to their relevancy, he being willing to undertake a proof of them), his letter of retraction was written and posted at Jedburgh before or about the hour of noon of the 1st of December, and arriving in Edinburgh in the course of that day, was delivered to Mr. Thomson early on the morning of the 2d of December, whereas the pursuers' letter of acceptance was written and posted at Edinburgh not sooner than half-past two o'clock on the 1st of December, and remaining in the post-office of Edinburgh all night, was delivered to the defender in Roxburghshire on the evening of the 2d of December. And thus, if either the time of writing and posting of these letters by the writers of them — or the time of the actual delivery of them to the parties to whom they were addressed — be held to be the *punctum temporis* when they became effectual, the retraction was prior in date to the acceptance.

When I pronounced the interlocutor now under review, I thought that the time of posting the letters was the criterion; as it then appeared to me that the posting of a letter was in effect delivery of it to or for behoof of the party to whom it is addressed. And if that opinion as to the effect of posting a letter be well founded, I still think that the conclusion I deduced from it was a sound one, inasmuch as even on that assumption the missive of retraction must be held to have been first

completed by delivery. And although, in consequence of the able and more ample discussion which the case has undergone since the interlocutor was pronounced, I have changed my opinion as to the effect of posting letters in such a case as the present, and I now think that such letters require to be actually delivered to the parties to whom they are addressed, or to those acting for them, the result appears to me to be the same, because the delivery of the letter of retraction preceded the delivery of the letter of acceptance by a still longer period of time than the posting did. The pursuers cannot escape from this dilemma, unless they establish not only that the mere posting of their letter of acceptance rendered it binding on both parties, but also that the posting of the defender's letter of retraction had not a similar effect. I do not think that they have established that proposition either on principle or on authority.

At the debate, the counsel for the pursuers was requested to state the precise ground on which the mere posting of such a letter of acceptance made it binding on the party to whom it is addressed, although he be then in ignorance of such a proceeding; and I did not hear any satisfactory answer to that question. So far as I could gather from the argument, the proposition was attempted to be supported on two different grounds: 1st, That the posting of the letter of acceptance being sufficient evidence of the pursuers having consented to accept of the defender's offer, the condition of the offer was purified by such acceptance, even although the defender was in ignorance of the proceeding until a late period of the following day; and, 2d, That the posting of the letter is to be held as having been delivery thereof on behalf of the defender. But I do not think that either of these propositions is consistent with the established principles of the law of Scotland.

1. Even assuming that the posting of the letter of acceptance on the afternoon of the 1st of December was sufficient evidence of the pursuers having then consented to accept of the offer, that consent was not such as could conclude this bargain until the letter was delivered to the defender; because, until it was communicated to the offerer, it was not in legal effect acceptance of an offer. An offer is effectually accepted only by the offeree doing that which binds himself to perform the counterpart of the offer. What is tendered by an offerer is to undertake to give or to do something on the offeree undertaking to give or to do something in return; and although the offer conferreth on the latter the conditional power of binding the former, this power can be exercised so as to purify that condition, and to deprive the offerer of his reserved power of retraction, only by the offeree binding himself to perform what is required of him in the offer. In short, so long as the offeree does not so bind himself, but reserves entire his option of being free from the bargain, the offerer also retains his reserved power of retraction, and neither party is irrevocably bound until both parties be so. And hence the pursuers' letter of acceptance,

so long as it did not effectually impose an irrevocable obligation on them to sell the estate of Renniston to the defender on the terms stated in his offer, could not deprive him of his legal reserved right to retract that offer.

But the letter of the pursuers had not that effect so long as it was not delivered to the defender. Even if it had not been essential to the efficacy of the acceptance that it should be in writing, it would not have been irrevocable by the pursuers so long as it was kept from the knowledge of the defender. The writer of the letter might have destroyed it so long as it remained in his own hands. After despatching it by his clerk, or servant, or any person in his employment, he might have recalled it before it arrived at its destination, and have still destroyed it. Or, after so despatching it, he might still have sent an express with a refusal of the offer, and if it had been first delivered, he would still have been free, and the treaty would have been at an end. In short, until the acceptance reached the offerer, there was not that *conventio in idem placitum* which is necessary to constitute a mutual contract.¹ Until then, the pursuers had not conferred upon the defender that power of exacting performance of the counterpart of the offer which was essentially necessary to constitute a binding obligation upon them, and to render their acceptance effectual; and their consent was merely a resolution, which has no such effect. This fundamental principle in the law of Scotland is clearly stated thus by Lord Stair, i. 10, 2: "We must distinguish three acts of the will, — desire, resolution, and engagement. 1. Desire is a tendency or inclination of the will towards its object, and it is the first motion thereof, which is not sufficient to constitute a right; neither is resolution (which is a determinate pur-

¹ "What is the precise moment when the concurrence of the two wills effects the extinction of the debt, and when the creditor can no longer revoke the offered release? Is it necessary that the acceptance be known to the creditor? M. Pardessus (*Cours de Droit Commercial*, tom. i. p. 252, *et seq.*) thinks that, immediately upon the acceptance of the offer, the contract is perfect, and that it can no longer be revoked by the creditor, though he does not yet know of the acceptance. I have held, on the contrary (tom. vi. No. 29, pp. 32, 33), that he who has made an offer can revoke it, up to the moment when the acceptance is known to him, because an acceptance which is not known is in law as if it did not exist. I have followed in that particular the doctrine of Heineccius, which seems to me the most correct, and which besides is sanctioned by the Code, art. 932, since it permits a donor to revoke his donation until he has knowledge of its acceptance. The reader can weigh the reasons of two professors, who both seek the truth in good faith without claiming to make their opinion prevail." — Toullier, *Droit Civil*, liv. iii. tit. iii. chap. v. No. 321, note 3.

"Quæri etiam solet, *sufficiatne acceptionem factam esse, an præterea requiratur, ut innotescat illa promittenti?* Subtiliter auctor resp. videndum esse, quid actum sit, nam posse utraque sub conditione conveniri, si alter acceptet, et si innotuerit illum accep- tasse. Deinde videndum sit, an promissio sit mutua, an unilateralis. Ibi necessarium esse, ut mihi innotescat acceptatio, hic præsumi illum accep- tasse.

"Sed non opus est his ambagibus. Semper requiritur, ut acceptatio mihi innotescat. Non esse et non apparere in jure pari passu ambulant. Sed innotescit mihi vel per signa alterius expressa, e.g. verba, litteras, &c. vel per præsumptionem, si alter tam sit indigus, ut non possit adspernari promissum." — Heineccius, *Prælect.* in Grotium, lib. ii. cap. xi. § 15. — ED.

pose to do that which is desired) efficacious; because whatsoever is resolved or purposed may be, without fault, altered, unless by accident the matter be necessary, or that the resolution be holden forth to assure others, the alteration whereof, without evident ground, importeth levity and inconstancy, and sometimes deceit and unfaithfulness; but still resolution is but an act of the will with itself, as deliberation is of the understanding acting within itself; and it is unquestionable nothing can be obliged to itself, though it be obliged to God, or to another in relation to itself; and, therefore, if a party should express a resolution to give unto, or to bestow upon, another any thing, though that resolution related to the good of another, yet it is not obligatory, nor can that other compel the resolver to perform, though it were never so fully cleared or confirmed by word or writ. So it was found that a resolution expressed both by word and writ in favor of near relations did not confer an obligation. — February 27, 1673, Kincaid *contra* Dickson, 12, 143. It remaineth, then, that the only act of the will which is efficacious is that whereby the will conferreth or stateth a power of exaction in another, and thereby becomes engaged to that other to perform.”

The pursuers' letter of acceptance, so long as it was undelivered and unknown to the defender, was ineffectual to bind them, not only according to the principle of that law of mutual contracts, but likewise according to another rule of the law of Scotland, — that delivery of a writing to the grantee, or to some person for his behoof, is, in the general case, necessary to make it binding on the grantor. As already stated, writing was as essential as consent itself to constitute the alleged contract, in respect that the subject of it was land. And although writing on one side may be effectual when it is followed by implement or *rei interventus*, importing that the parties were acting upon it, yet as the present action is not laid upon any such medium, but expressly on the ground of the defender's missive of offer having been accepted by the pursuers' missive of 1st December, 1853, the latter writing required to be validated according to the established rules of law. And while the want of the statutory rules of authentication is of no importance in consequence of its having been holograph of the grantor, yet so long as it was not delivered to the grantee it was not binding on the former, and consequently did not deprive the latter of his right of retracting his offer. Delivery is, in such a case, as indispensable a solemnity to validate a writing, as are the statutory solemnities in cases in which writing is not holograph nor privileged. And had the pursuers' missive not been holograph, it would not have been effectual as an acceptance without the statutory solemnities, even although the offer itself had been holograph or duly authenticated. This was decided in the case of Barron, 23d January, 1794, Mor., p. 8463, where one of the mutual missives by which a contract as to heritable property was entered into was neither attested nor holograph, and the court held that “a bargain concerning heritage may indeed be completed by a unilateral obligation. But the present is not a case of that kind. It is a mutual con-

tract entered into by mutual missives, which must be binding on both or neither of the contracting parties. This is the rule in all bargains concerning heritage, as has been solemnly decided." And accordingly Erskine, iii. 2, 2, states: "Where an agreement concerning heritage is executed in the form of mutual missives, both missives must be probative, otherwise either party may resile." And as the delivery is as necessary to the validity of such a writing as is any of the statutory solemnities, it follows that, so long as one of the writings by which alone this alleged contract is said to have been constituted was not delivered, it was of no effect, and it remained in the power of either party to resile. And for this reason, as well as on the more general rule in the law of mutual contracts above stated, I think that, until the missive of acceptance was delivered to the defender, the pursuers had not become irrevocably bound to him, and he had not been deprived of his power of retraction.

2. Nor is there any authority in the law of Scotland for holding that the posting of the letter of acceptance by the pursuers is to be dealt with as delivery thereof to or on behalf of the defender. If this were the rule, there appears to be no good reason why that rule should not be applied also to the defender's letter of retraction; and if it were, then, as already stated, the retraction was completed by delivery thereof to or on behalf of the pursuers before the acceptance was so delivered.

But the pursuers have failed, as I think, to show that the posting of their letter had such an effect in law. The postmaster-general and the subordinate officers and servants of the post-office establishment are not constituted by law the agents or mandatories of the parties to whom posted letters are addressed, and are not even in the position, nor subject to the rules, of common carriers; and a party to whom a letter is addressed is not placed in the position of having received delivery of it, by its being merely dropped into the receiving-box of a distant post-office, and before he actually receives it, or has any knowledge of its existence. And although the writer of a posted letter may not be entitled to obtain redelivery of it from the officers of the post-office, this is only in consequence of a regulation for the benefit of the public, which equally forbids these functionaries to deliver the letter to the party to whom it is addressed until it reaches its destination. In short, the writer of a posted letter, although he may have lost command over the document itself, has no more lost his control over the act of his will which he therein expresses, than if that document were still in the hands of his own servant or messenger. That this is the true view of the matter appears to me to be established by the case of *Lady Dunmore*, 15th December, 1830, where a letter, written in order to conclude a contract of hiring, was placed in a post-office, and some hours afterwards another letter was posted retracting the former one, and both of the letters were received at the same time by the party to whom they were addressed. If the mere

posting of the letters had been equivalent to delivery, then the bargain would have been irrevocably concluded the moment the first one was posted; and the second one containing the retraction would have been too late and ineffectual. But the court held that neither of them were binding until they were delivered; and that the first one was duly retracted, and the bargain was not concluded. Lord Newton, who pronounced the judgment which was affirmed by the Inner House, stated the ground of the judgment. After stating the necessity of delivery to make a missive of offer binding, he proceeds: "Nor will the writing of a letter of acceptance be sufficient if this letter is never sent. The Lord Ordinary conceives that if, after writing such a letter, the author should add a postscript, stating that, on farther consideration, or in consequence of new intelligence, he did not choose to accept the offer, and if, from the letter's referring to other matters, he still thought it necessary to send it, the acceptance would be effectually recalled. But if this be the case, the same effect would follow when a second letter retracting the offer is transmitted by the same post, so as to be received at the same time, or where a communication to this effect is made, by express or otherwise, to the offerer before the acceptance reaches him. In short, each party may resile so long as his offer or acceptance has not been communicated to the other party."

Nor was a different principle established, as the pursuers maintain, in the case of *Dunlop v. Higgins*, 2d July, 1847, affirmed on appeal 24th February, 1848. In that case the question was, — not whether the offer had been retracted before it was accepted? because there had confessedly been no retraction of the offer, either delivered, or posted, or even written, before the letter of acceptance of it was actually received by the offerers, but whether the acceptance had been made within the period limited by the usage of trade for that purpose? The offer was sent from Glasgow to Liverpool, and the acceptance was not only posted in Liverpool, but received by the offerers in Glasgow, without the latter having in the mean time retracted the offer; and the ground on which the latter attempted to resile from the bargain was, that according to usage of trade the time within which such a mercantile offer may be accepted is limited to the return of post; and the offeree had not accepted it (as was alleged) by the return of post, inasmuch as, although he had posted his letter at Liverpool on the very day he had received the offer, it had been detained on its journey to Glasgow in consequence of the road having been obstructed by frost. It was held that the acceptance was made according to that rule of commercial usage, as it was duly sent by return of post, although the return of the post was so accidentally delayed. But the question, whether the offer could not have been retracted by the offerer before it was actually delivered to the offeree, not only was not decided in the affirmative in that case, but was expressly held to be left open, as appears from the following remarks of Lord Fullerton, which were acquiesced in by the other judges. He said: "I find it necessary to make a distinction

which neither party were disposed to notice in the course of the argument. I mean the distinction between the binding effect of the acceptance when put into the post, as barring the offerer from founding on the implication that it was declined, and the absolute completion of the contract. I think the posting of the acceptance by the pursuers had most certainly the first effect. That having been done, there was no silence on their part, and consequently the pursuers were barred from arguing that the offer must be held to have been declined. But I am by no means prepared to go farther, and to say that in the larger question of the actual completion of the contract, the mere fact of the putting of the letter of acceptance into the post-office has the same effect as if it had not only been put into the post-office, but had been actually delivered to the other party." And his Lordship, after criticising Professor Bell's opinion, to which I shall afterwards advert, adds: "I do not see how there can be *in idem placitum concursus et conventio* between two parties, where one of them remains in entire ignorance of the fact—the acceptance—on which the *concursus et conventio* is supposed to rest." These remarks show that the principle of the case of Lady Dunmore was left untouched and entire by the decision in this case of Higgins.

As to the English case of *Adams v. Lindsell*, 1 Barn. & Ald. 681, founded on by the pursuers, it might be sufficient to state that, if the principle which has received effect in Scotland were at variance with the law of England, this would only be one of many particulars in which the principles of the two systems of law as to contracts, and particularly as to contracts for sale, differ from each other; and that of course this Scots case must be decided according to the law of Scotland. But in that case, as in the Scots case of Higgins, no retractation of the offer was either posted or written by the offerer before he received actual delivery of the offeree's acceptance; and there also the question was only whether the acceptance had been made within the time which in that case was expressly conditioned in the offer,—viz., by return of post. That question was decided in the affirmative, because the offeree despatched this acceptance by the first post after he received the offer, although that offer had not reached him in due time in consequence of a mistake by the offerer himself in misdirecting it.

It may be farther remarked, that as the reports of both the cases of Higgins and of Adams state that they proceeded upon what was held to have been a usage of trade in such commercial cases, these decisions could be of no authority in a question as to the completion of a contract of sale of land in Scotland, as such a transaction is not alleged to be subject to the operation of any such usage of trade.

The pursuers farther maintained that the mere posting of their letter of acceptance ought to be held as delivery of it to the defender, because he having sent his offer through the post-office constituted it the medium through which the answer was to be sent to him. But since the law itself did not place the officers of the post-office in the position of servants or mandatories of the defender in the management of this

transaction, there appears to me to be no ground for holding that they were placed in such a position by his authority. Although he availed himself of that public mode of conveyance to transmit his letter to the pursuers, he did not tell them how to transmit their answer, and left them at full liberty to do so by sending it by their clerk, or servant, or by delivering it personally, as well as by sending it through the post-office. Not only did the defender not authorize the officers of the post-office, or any other third party, to receive an acceptance on his behalf, but on the contrary he appears to me to have expressly excluded any such pretence by his having stated in his letter of offer that the acceptance was to be delivered to himself, inasmuch as he stipulated, in his offer of 26th November, that "upon hearing from you that these terms are to be acceded to, the form necessary in such transactions will be gone through." I refer to this clause not as being a stipulation for what would not have been requisite by the ordinary rule of law although it had not been expressed, but as showing that the defender did not dispense with the ordinary rule of law, and required the pursuer, in conformity with that rule, to inform himself whether the terms of his offer were to be acceded to.

The pursuers found upon a remark in Professor Bell's Commentaries, i. 326, that "in the common case it is not necessary that the acceptance shall have reached the person who makes the offer." But no authority is quoted in support of that remark; and although it is correct enough as to several classes of cases, such, for example, as those in which there is an unconditional promise, or in which orders for goods are given and implemented, it is not consistent with the principles of the law of Scotland relative to the completion of onerous contracts, which can be entered into only by writing, and where the writings are to consist of a conditional offer by one party, and such an acceptance by the other as binds him irrevocably to perform the counterpart of the offer. This doctrine accordingly was not adopted in the case of Lady Dunmore; and in the case of Higgins it was stated from the bench to require some modification. And even Professor Bell himself does not appear to have thought that it applies to cases where writing or some other external act is essential to the constitution of a contract, as is the case here; for he states in the sequel, that (*ib.* p. 327) "the doctrine of *locus pœnitentiæ* is a corollary from the law which appoints particular evidence or solemnities for the constitution of obligations. Till the final purpose to undertake an obligation be declared, and the pledge of faith conclusively given, there is no binding obligation, there is *locus pœnitentiæ*."

Both parties have quoted largely from the writings of jurists and commentators on the civil law. But the speculations of these learned authors are so much at variance as to make them of but little use as guides in such a question. And fortunately in Scotland we have those general principles of the law of contracts, which have been adopted in this country, stated in a very lucid manner by a most eminent jurist,

who, after having taught philosophy as a professor in one of our universities for several years, was distinguished as a practising lawyer and a most eminent judge for a period of about half a century, and who, as he himself informs us (Preface to More's Stair, p. 22), as to his Institutes of the law of Scotland, "did derive it from that common law that rules the world, and compared it with the law civil and canon, and with the custom of neighboring nations." I am referring, of course, to Lord Stair, and it is in his Institutes I have looked for and found those principles of the law of Scotland, on which I have founded my opinion in this case. And I may add, that my confidence in the general principle, stated by Lord Newton as the ground of the judgment in the case of Lady Dunmore, is much strengthened by the circumstance that that eminent judge was for a considerable time professor of civil law in the University of Edinburgh. And unless the principles taught by these authorities are now to be relinquished as our guides in practice, I think that the relevancy of the defence in this case must be sustained.¹

The Court pronounced the following interlocutor: "Recall the interlocutor of the Lord Ordinary reclaimed against; repel the pleas stated for the defender, and decern against him conform to the conclusions of the libel: Find the defender liable in expenses to the pursuers," &c.

S— v. F—, D—, AND OTHERS.

COURT OF CASSATION IN FRANCE, SEPTEMBER 1, 1813.

[Reported in *Merlin, Répertoire de Jurisprudence, Tit. Vente, 1. Art. III., No. XI. bis.*]

IN the beginning of January, 1813, D., who was intending to purchase an English license, was at Paris with S. of Havre, who had recently purchased the ship *Elisa* of one M. Filleau.

S. proposed to transfer his bargain to D. for his firm, F., D., & Company.

To induce D. to treat with him, S. declared that he would assume, among other obligations, that of furnishing this vessel with fifteen men, comprising therein two captains and one master of perfectly good repute, and that the vessel should be ready to put to sea the 5th of February, 1813.

The bargain was not concluded; S. returned to Havre: it was agreed that D. should write to him, if he concluded to make the purchase in question.

The 21st of January, 1813, the Messrs. D. wrote to S. as follows:

¹ An opinion was also delivered by Lord Deas, concurring with those of the Lord President and Lord Ivory, but it has not been thought necessary to print it in this collection. — Ed.

“You have guaranteed to us to furnish this ship with fifteen men, comprising therein two captains and one master of perfectly good repute, and that the ship shall be ready to put to sea the 5th of February next. . . . With these several assurances and guaranties, without which we should not treat, since this affair is based entirely on our confidence in your aforesaid assurances and guaranties. . . we consent to assume in your place and stead, the payment to M. Filleau of the price of 55,000 francs,” &c.¹

S. answered this letter by two others of the 23d, the one written, as he said, in the morning, and the other in the evening; but they both arrived at Paris on the 25th, at the same moment.

In the first of these letters he said: “The ship was still in my hands when your letter reached me; it is therefore yours *upon the conditions agreed upon between us*. You can act accordingly. I have only time to address you this word, so that you may receive it to-morrow evening. A longer letter, which I am going to write to you this evening, will reach you Monday morning by the diligence.”

In the second letter, after announcing that the definitive act of sale would be passed on the morrow, he added: “The most difficult thing is the crew, with which I have occupied myself since the receipt of your letter. . . . It is very true that I said to you that I could have the ship ready to sail the 5th of February; she will be much sooner; but as to the crew, if you had come to a decision in time, I would have written from Paris to obtain one; and now it is going to be necessary to send an agent to look for one, and it is scarcely possible that this crew can be at hand at so early a date: I shall leave nothing undone, however, to accomplish it.”

To this letter . . . the Messrs. D. replied, by letter of the 25th January, that they could not accept the purchase, since S. did not assure them of the provision of a crew of good character, and of two honest and intelligent captains, as he had offered and guaranteed to them, so as to put to sea the 5th of February, conditions specified in their letter of the 21st, and upon which they had made the purchase of the ship *Elisa* to depend.

The same day, the 25th, S. confirmed his letters of the 23d, announcing that the act had been signed on the 25th, that he had received 55,000 francs in drafts, the price of the ship, &c.

S. added that he had sent a man to Ostend, Dunkirk, and Antwerp, for the crew; that it was necessary to be on the alert; and that he intended that every thing should be ready the 5th of February, *if it was possible*.

The Messrs. D. replied to this letter the 28th, confirming the positive refusal expressed in that of the 25th. They said they had only consented to the purchase upon the several conditions specified in their

¹ Messrs. D. added: “We shall expect your answer by return of post. . . . Please to deliver your answer to the conductor of the mail, promising him two or three francs.”

letter of the 21st; and that all the guaranties demanded not having been accorded, they were not bound.

Upon the presentation of the bills drawn by S. to the order of M. Filleau, who had sold the *Elisa*, the Messrs. D. & Co. refused to accept them.

Thereupon Filleau had recourse to S. as the drawer of the bills, and S. commenced proceedings before the Tribunal of Commerce of Havre against F., D., & Co., to enforce his alleged contract with them; and judgment was there rendered in the plaintiff's favor.

The defendants thereupon appealed to the Court of Appeal of Rouen, where the judgment was reversed; and from the decree of reversal the original plaintiff appealed to the Court of Cassation.¹

In the latter court Merlin argued as follows in support of the decree appealed from: —

What law has the Court of Appeal of Rouen violated, in declaring that the two letters, for the reason alone that they reached the Messrs. D. at the same time, formed as to them only one indivisible whole?

It has, they say, violated law 65, D. *de acquirendo rerum dominio*, and law 14, § 17, D. *de furtis*, which decide that a letter addressed to a person ceases to belong to him who wrote it, from the moment when he delivers it to the individual whom the person addressed has charged with receiving it and bringing it to him. Whence it follows that the first letter of the 23d of January became the property of the Messrs. D. at the very instant that the demandant delivered it to the conductor of the mail, conformably to the direction which the Messrs. D. had given him on that subject; that from that instant the contract was formed between the Messrs. D. and the demandant; and that the demandant could neither break it nor modify it by the second letter of the same day. . . .

Assuming that the first letter became the property of the Messrs. D. at the very instant when the demandant delivered it to the person indicated to him for that purpose, would it follow that the Messrs. D., receiving the second letter at the same moment as the first, could not consider it as modifying the consent, pure and simple, given to their propositions by the first, as putting upon that consent a restriction which left them at liberty to reconsider their propositions?

In order to decide this question, let us examine another connected with it: Could the demandant, having written and sent his first letter, revoke its contents before it reached the Messrs. D.; and if, having done so, his revocation had been notified to the Messrs. D. before they received the first letter, could the Messrs. D., on receiving afterwards his first letter, adhere to it in spite of him, and force him to execute the bargain to which by his first letter he had given his assent?

The demandant maintains that he could not revoke it; but he main-

¹ All details as to the proceedings in the lower courts, and also portions of the argument of Merlin, have been omitted. — Ed.

tains it only because the interests of his cause oblige him to do it; and good sense and the most weighty authorities rise up against his assertion. What is a letter missive by which I announce to you that I accept the bargain which you have proposed to me? Nothing else than a dumb agent, which I send to declare to you my acceptance; and it is thus that Cujas considered it in his notes upon the title of the Code, *si quis alteri vel sibi emerit*, when he says: *Epistola non contrahit, sed nunciat dominum contrahere*.

Now it is an elementary maxim that I can recall my agent, so long as he has not executed his mandate.

I can therefore recall the letter which I have addressed to you, so long as it has not reached you, so long as it has not brought to you the words which I had given it in charge for you.

Grant that you are the owner of the material of my letter from the moment when I committed it either to your carrier or to a public messenger, who is the carrier of everybody, at the proper hour. That does not deprive my letter of the character of a dumb agent; it does not consequently prevent me from recalling it before you have received it.

Suppose we look at the letter missive under another aspect; suppose we say, with the demandant, that it is a series of words fixed upon paper; we shall still arrive at the same result.

Indeed, in what sense is it true, as the demandant says, that the words fixed upon the paper in the morning are as distinct from those which were affixed to it in the evening, as the words pronounced at mid-day are distinct from those which are pronounced six hours after?

It is true in this sense, that, if the words fixed upon the paper in the morning reach the person to whom they are addressed before those which were affixed to it in the evening, those of the evening cannot destroy those of the morning.

But it is false in this sense, that the words fixed upon the paper in the morning preserve their priority over those of the evening, if those of the evening reach the person to whom they are addressed either before those of the morning or at the same time.

Bartolus, whom all the authors have copied in this regard, establishes, upon law 4, D. *de donationibus*, a principle which puts this in the clearest light. A letter, says he, is for the absent to whom it is written what words are addressed to a person present; and he who sends a letter to another is considered as speaking to him as if he was present: *Epistola absenti idem est quod sermo præsens*; et qui mittit alteri litteras, intelligitur præsens præsenti loqui.

Now it is certain that words addressed to a person present can only bind him who uttered them, so far as the person to whom they were addressed heard them before they were retracted.

It is therefore the same of a letter written to an absent person. This letter therefore can only oblige its author, so far as the absent person to whom it is written receives it and reads it, things being still entire.

This is the necessary consequence of the very definition which the demandant gives of a letter missive. A letter missive is only a series of words fixed upon paper; but these words are addressed to an absent person; it is necessary therefore, in order that they should have their effect, that the absent person to whom they are addressed should understand them; they are, therefore, without effect so far as he to whom they are addressed has not understood them; as they would be without effect if, being addressed to a person present, that person was, from a physical cause, not in a condition to understand them. Now how can an absent person understand the words that are addressed to him? Certainly he can only understand them by reading the letter which contains them. The letter by which I contract an obligation can therefore only fulfil its object so far as I can be supposed to persist, at the moment when it arrives, in the will which I had in writing it. If, therefore, at the moment when my letter arrives, I have already in another way manifested and notified a contrary will, my letter can no longer bind me; it is paralyzed in advance.

That is so true that if, at the moment when my letter arrives, I am no longer able to speak to the person to whom it is addressed, or to persist in the will which I had in writing it, that will cannot be opposed to me, it cannot produce any effect against me; and it is upon this foundation that all the doctors teach that if, after having written to a person with whom I was in treaty for a bargain, that I accepted his proposition, I happen to die before my letter reaches that person, there is no contract between him and me.

“Epistola,” says Surdus, lib. 1, Consilium 136, in accordance with a host of authors whom he cites, “obligare non potest scribentem, si is decedat antequam ad eum pervenerit cum quo erat contrahendum, quia cum per mortem deficiat scribentis consensus, non potest dici quod ejus scriptura loquatur; per epistolam enim præsens videtur absenti loqui; sed mortuus non loquitur; ideò cessat præsumptio seu conjectura.” . . .

Alexander, lib. 5, Consilium 22, No. 9, professes the same doctrine: “Epistola,” says he, “seu scriptura quæ mihi absenti à te dirigitur, non potest acceptari et ratificari per me, mortuo illo scribente seu illo qui scripturam ad me dirigebat. . . . Quia, mortuo eo, non potest dici quod scriptura ejus loquatur.”

The same language is used by Benvenuttus Straccha, in his treatise *De Mercatura*, title *De Probationibus*, No. 16: “Quod diximus litteras quæ inter absentes mittuntur probare, non procedit ubi antequam ei cui scriptæ sunt litteræ traditæ fuissent, decessisset is qui scripsisset. Cujus rei illa ratio redditur, quia per litteras absens absentem dicitur alloqui; non ergò dici potest alloqui qui misit, si antequam traderentur decessit.”

The same author, in his treatise *De Abjecto*, last part, No. 8, adverts again to this doctrine, and he opposes to it an objection: “Every one agrees,” says he, “that he who contracts by letter is considered as

binding himself at the moment when he writes; the contract is therefore perfect on his side at the instant when the letter leaves his hands: mittens epistolam consentit eo tempore quo mittit. But," he answers, "although he who writes a letter obligatory truly consents at the instant when he causes it to start, his consent only binds him because he persists in it up to the moment when his letter reaches its address: et huic objectioni respondeo quod licet mittens consentiat tempore quo mittit, verum est etiam consentire tempore quo litteræ tradentur, quia durat primus (consensus), et ex quo non reperitur mutata voluntas, præsumitur durare. And for this reason," continues he, "if death chances to overtake you before the letter by which you oblige yourself to me is delivered to me, your obligation falls, and I cannot avail myself of it against your heirs: undè si epistola à te missa mihi inscripta est, te mortuo cum mihi traditur, acceptari à me non potest."

Baldus upon law 1, D. *Mandati*, explains himself in precisely the same manner: "Licet mittens consentiat tempore quo mittit, tamen consentit tempore quo epistola pervenit ad eum cui mittitur, quia durat primus consensus; ex quo non reperitur mutatus, voluntas præsumitur durare; et ideò puto quod si antequàm perveniat epistola, morietur mittens vel efficiatur furiosus, quod tunc non contrahatur obligatio per epistolam, quia non durat voluntas nec intervenit consensus tunc temporis."

Pothier, whom the demandant cites to you as teaching the contrary in his *Traité du Contrat de Vente*, says, however, neither more nor less. After having established that the agreement upon the thing and the price, of which the contract of sale is composed, can take place between the absent by letters, he adds: "In order that the agreement should take place in this case, it is necessary that the will of the party who writes to the other to propose to him the bargain should continue until the time when his letter shall reach the other party, and the latter shall declare that he accepts the bargain." Pothier, therefore, acknowledges very clearly that the consent written in a letter only becomes irrevocable by the delivery of the letter to him for whom it is intended; he acknowledges, therefore, very clearly that, so long as the letter has not reached that person, he who wrote it can revoke its contents.

Be it well observed, moreover, Pothier does not limit his decision to the case where the letter is carried by the messenger of him who wrote it; so far from it, he applies it specially to the case of a letter written from Orleans to Leghorn, that is to say, to a case where correspondence is very seldom carried on except by post, true messenger of the public, and consequently to a case where, by the terms of the Roman laws invoked by the demandant, he to whom a letter is addressed becomes proprietor of it at the instant when the writer parts with it; and therefore it is evident that Pothier, who, according to the expression of the demandant, knew well the text of those laws, himself condemns the inference which the demandant seeks to draw from them.

But, exclaims the demandant, Pothier does not say that it is necessary, for the completion of a contract of sale, that the answer of acceptance should reach the proposer.

No; he does not say it expressly, and why? Because there is no need of saying it, it being understood. And in fact the consent of him who accepts the proposed bargain is of no other nature than the consent of him who makes the proposal; both consents are equally necessary for the completion of the contract. If, therefore, he who proposes is not bound by the proposition, when he retracts it before it has reached its address, he who accepts can no more be bound by his acceptance, when he retracts it before it has reached the author of the proposition.

And here recurs the comparison, which we made just now, of the consent expressed by a letter addressed to an absent person, with the consent expressed by words addressed to a person present.

I find myself in the presence of a deaf person who says to me: Will you buy of me such a thing for such a price? I answer him: I will; but he does not hear me; he declares to me that he has not heard me, and he prays me to give him in writing the answer which he judges, by the movement of my lips, that I have made to him. Then I take a pen and trace for him these words: I said that I would, but on further reflection your proposition is not satisfactory. Could this man pretend that, by the answer which I admit that I made to him *viva voce*, I am bound to him irrevocably? Certainly not; and if he prosecuted me, the judge would dismiss him without hesitation.

Wherefore would it be otherwise in the case of a letter written to an absent person? Because the absent person has become proprietor of my letter from the moment when it left my hands? But let us take another comparison.

A man has in his cabinet an acoustic vault, constructed in such a manner that, by reason of the various and extremely multiplied windings of the tubes which compose it, the words transmitted through one of the extremities do not reach the other till after a space of five minutes. I am in the presence of that man, and in his cabinet in question. There, after saying to me: Will you buy of me such a thing for such a sum? he adds: Answer me by my acoustic vault. Thereupon we take our places, I at one of the extremities of his vault, he at the other; and I say to him by this speaking trumpet: I will. But a minute after I change my resolution; I run to him, and before he has been able to hear my answer, I say to him: I will not. Could he, after having heard the answer which I made to him at first by his acoustic vault, pretend that this answer having been transmitted to him by tubes of which he was proprietor, and having consequently become his property at the very instant that it left my mouth, I could not retract it before it had struck his ear? No, emphatically no: a hundred times no!

For the same reason, the obligation which I contract by a letter to an absent person does not bind me, so long as the absent person to whom I have addressed that letter has not received it.

Therefore, we ought to hold it as very evident that, if the demandant had, before the arrival of the first letter of the 23d of January, caused a second letter to reach the Messrs. D., by which he had declared to them that he revoked the acceptance which he had made of their propositions by the first, the Messrs. D. would not have had any action against him to compel him to execute the bargain which was negotiating between him and them.

But what the demandant could do by a second letter arriving before the first, could he not do equally by a second letter which, without anticipating the first, reached the Messrs. D. at the same time? Yes, without doubt he could: the two letters arriving together, the Messrs. D. could not say that the consent expressed by the first still subsisted; they could not say that the dumb agent, whom the demandant had sent to them by the first, still had power to manifest to them his consent; they would have been forced to regard the second as taking from the first all credit.

Assuming that, our question resolves itself in the same manner. Since the demandant could, by a second letter arriving at the same time as the first, revoke in a definitive and absolute manner the acceptance contained in the first, it is clear that he could equally, by such second letter, modify that acceptance; that he could equally retract the assurance which he had given by the first, that the crew would be ready by the 5th of February, and substitute for it a simple promise to do every thing in his power to that end; that he could equally restore to a state of negotiation what by the first he had concluded definitively; in a word, that he could equally give to the Messrs. D. the right to reconsider their propositions and retract them.

The decree of the Court was in the following terms:—

Considering that the decree attacked has only interpreted a correspondence held between two parties upon commercial agreements, and that, therefore, it has not violated any law, —

The court rejects the appeal.

CHAPTER II.

CONSIDERATION.

SECTION I.

Nature of Consideration.

ELEANOR THOMAS *v.* BENJAMIN THOMAS.

IN THE QUEEN'S BENCH, FEBRUARY 5, 1842.

[*Reported in 2 Queen's Bench Reports, 851.*]

ASSUMPSIT. The declaration stated an agreement between plaintiff and defendant that the defendant should, when thereto required by the plaintiff, by all necessary deeds, conveyances, assignments, or other assurances, grants, &c., or otherwise, assure a certain dwelling-house and premises, in the county of Glamorgan, unto plaintiff for her life, or so long as she should continue a widow and unmarried; and that plaintiff should, at all times during which she should have possession of the said dwelling-house and premises, pay to defendant and one Samuel Thomas (since deceased), their executors, administrators, or assigns, the sum of 1*l.* yearly towards the ground-rent payable in respect of the said dwelling-house and other premises thereto adjoining, and keep the said dwelling-house and premises in good and tenantable repair. That the said agreement being made, in consideration thereof and of plaintiff's promise to perform the agreement, Samuel Thomas and the defendant promised to perform the same; and that although plaintiff afterwards and before the commencement of the suit, to wit, &c., required of defendant to grant, &c., by a necessary and sufficient deed, &c., the said dwelling-house, &c., to plaintiff for her life, or whilst she continued a widow; and though she had then continued, &c., and still was, a widow and unmarried, and although she did, to wit, on, &c., tender to the defendant for his execution a certain necessary and sufficient deed, &c., proper and sufficient for the conveyance, &c., and although, &c. (general readiness of plaintiff to perform), yet defendant did not nor would then or at any other time convey, &c.

Pleas: 1. Non assumpsit. 2. That there was not the consideration alleged in the declaration for the defendant's promise. 3. Fraud and covin. Issues thereon.

At the trial before Coltman, J., at the Glamorganshire Lent Assizes, 1841, it appeared that John Thomas, the deceased husband of the plaintiff, at the time of his death, in 1837, was possessed of a row of seven dwelling-houses in Merthyr Tidvil, in one of which, being the dwelling-house in question, he was himself residing; and that by his will he appointed his brother Samuel Thomas (since deceased) and the defendant executors thereof, to take possession of all his houses, &c., subject to certain payments in the will mentioned, among which were certain charges in money for the benefit of the plaintiff. In the evening before the day of his death he expressed orally a wish to make some further provision for his wife; and on the following morning he declared orally, in the presence of two witnesses, that it was his will that his wife should have either the house in which he lived and all that it contained, or an additional sum of 100*l.* instead thereof.

This declaration being shortly afterwards brought to the knowledge of Samuel Thomas and the defendant, the executors and residuary legatees, they consented to carry the intentions of the testator so expressed into effect; and after the lapse of a few days they and the plaintiff executed the agreement declared upon, which, after stating the parties and briefly reciting the will, proceeded as follows:—

“And whereas the said testator, shortly before his death, declared, in the presence of several witnesses, that he was desirous his said wife should have and enjoy during her life, or so long as she should continue his widow, all and singular the dwelling-house,” &c., “or 100*l.* out of his personal estate,” in addition to the respective legacies and bequests given her in and by his said will; “but such declaration and desire was not reduced to writing in the life-time of the said John Thomas and read over to him; but the said Samuel Thomas and Benjamin Thomas are fully convinced and satisfied that such was the desire of the said testator, and are willing and desirous that such intention should be carried into full effect: Now these presents witness, and it is hereby agreed and declared by and between the parties, that, in consideration of such desire and of the premises,” the executors would convey the dwelling-house, &c., to the plaintiff and her assigns during her life, or for so long a time as she should continue a widow and unmarried: “provided nevertheless, and it is hereby further agreed and declared, that the said Eleanor Thomas or her assigns shall and will, at all times during which she shall have possession of the said dwelling-house, &c., pay to the said Samuel Thomas and Benjamin Thomas, their executors, &c., the sum of 1*l.* yearly towards the ground-rent payable in respect of the said dwelling-house and other premises thereto adjoining, and shall and will keep the said dwelling-house and premises in good and tenantable repair:” with other provisions not affecting the questions in this case.

The plaintiff was left in possession of the dwelling-house and premises for some time ; but the defendant, after the death of his co-executor, refused to execute a conveyance tendered to him for execution pursuant to the agreement, and shortly before the trial brought an ejectment, under which he turned the plaintiff out of possession. It was objected for the defendant that, a part of the consideration proved being omitted in the declaration, there was a fatal variance. The learned judge overruled the objection, reserving leave to move to enter a nonsuit. Ultimately a verdict was found for the plaintiff on all the issues ; and in Easter Term last a rule *nisi* was obtained pursuant to the leave reserved.

Chilton and W. M. James now showed cause. It is sufficient if there be any legal consideration for this agreement. [E. V. Williams conceded that, in a court of law, he could not go into the adequacy of the consideration, and that, if the consideration was in part a legal and in part only a moral one, the latter part need not be stated in the declaration.¹] The objection taken at the trial was, that the consideration for the agreement, instead of being that which is alleged in the declaration, was, as stated in the agreement itself, a respect for the testator's intentions, in which case this would be a mere voluntary agreement: the defendant now appears to contend that respect for the testator's intentions is a part of the legal consideration, and ought to have been set out. But it could not be so characterized. All that a plaintiff is required to do is to set out the legal effect of the contract, and to show performance on the plaintiff's part: here she was in possession for three or four years paying rent, under an undertaking to pay rent and keep the premises in repair: that is a good consideration; and if so, it cannot be necessary in pleading it to allege additional motives, which, in the eye of the law, do not enter into the consideration. Thus, in debt for rent on a demise of a messuage with the furniture, though in fact the furniture forms an important item in estimating the rent, yet, as in point of law the rent issues out of the real property, and not out of the furniture, it is sufficient to allege a demise of the real property. *Farewell v. Dickenson*.² Parties are often influenced by motives which form no part of the legal consideration, such as the character of a tenant, or the merits or distresses of the party intended to be benefited; and the circumstance that such motives happen to be stated in the agreement cannot affect the legal rights of the parties, nor make it necessary to state those motives in the declaration.

E. V. Williams, contra. The consideration alleged in the declaration is solely the promise to pay rent and repair: therefore it lay on the plaintiff to prove that to have been the true and sole consideration. *Beech v. White*.³ But the evidence shews that the testator's declaration, as brought before and recognized by the executors, was part, if not the whole, of the consideration. It is conceded that where there is a good legal consideration conjoined with a moral one, it is not necessary

¹ On this point *Chilton* cited *Bul. N. P.* 147, and 1 *Chitt. Plead.* 295, 300, 6th ed.

² 6 *B. & C.* 251.

³ 12 *A. & E.* 668.

to state both; but here regard for the testator's intentions was not, under the circumstances, a mere moral consideration; for the declaration had been made and reduced to writing so formally that it might well be thought valid in law, and so the agreement be made by the executors and residuary legatees to buy peace.¹ If the testator's expressed wish was part or the whole of the consideration, the declaration should have so alleged it, and a nonsuit ought to be entered. But in fact, if it be not the consideration, there is no legal consideration at all: this is a mere gift *cum onere*; and, had it been stated truly, the declaration would have been bad on general demurrer. [PATTESON, J. The rent, if issuing out of the house, might follow the gift; but the obligation to repair does not.] The expressions in the agreement with reference to the ground-rent, and the evidence of one of the witnesses, show that the property was held under a superior landlord: the assignee's obligation to pay rent and repair would therefore be implied from the very nature and state of things which existed between the parties. Bayley, J., in *Burnett v. Lynch*.² [LORD DENMAN, C. J. There is nothing to show who was liable to pay the ground-rent. COLERIDGE, J. The 1*l*. is reserved payable to the executors: it is quite different from an assignee's liability.] Still the annexing of such a payment cannot be regarded as the consideration. What is meant by the consideration for a promise, but the cause or inducement for making it? Plowden,³ commenting on *Sharington v. Strotton*, says, "Note: That by the civil law *nudum pactum* is defined thus: *Nudum pactum est ubi nulla subest causa præter conventionem; sed ubi subest causa, fit obligatio, et parit actionem.*" In *Chitty on Contracts*⁴ the following passage is cited from the *Code Civil*: "L'obligation sans cause, ou sur une fausse cause, ou sur une cause illicite, ne peut avoir aucun effet." The rent and repairs cannot be said to have been the cause or motive which induced the executors to make this agreement: it must have been such a belief as is recited in the agreement itself, which, though a good moral consideration, and perhaps sufficient to raise a use, is not sufficient to support a promise. The proviso merely causes the donee to take the gift charged with the burthen of paying the rent and keeping the premises in repair; and she cannot turn these conditions into a consideration. It is clear that, if the proviso had not existed, the executors might have retracted at any moment; their right to do so cannot be qualified by the circumstance that the gift was *cum onere*; otherwise, when carried out to conveyance, it would be a conveyance on good, as distinguished from valuable, consideration. Suppose a subsequent sale; a purchaser for value would have been entitled, though he had purchased with notice of the gift. A consideration, to be suffi-

¹ See *Haigh v. Brooks*, 10 A. & E. 309, and *Brooks v. Haigh*, 10 A. & E. 323.

² 5 B. & C. 589, 605. See also the judgments of Holroyd, J., and Littledale, J., in the same case.

³ Note to *Sharington v. Strotton*, Plowd. 309.

⁴ P. 28, 3d ed. 1841. *Code Civil*, liv. 3, tit. 3, ch. 2, §§ 4 and 1131.

cient against such a purchaser within the saving clause of the 27 Eliz. c. 4, s. 4,¹ must be such a consideration as would support an assumpsit. Were it otherwise, donees by voluntary gift would confirm their estates by covenanting to repair a monument, maintain a plantation, or the like. Here the donors in effect say, that the donee is to pay no purchase-money, but is to do what a purchaser for full consideration would have to do, — pay the rent and maintain in repair. And it is to be observed that, in that part of the agreement where the purchase-money is usually mentioned, instead of any valuable consideration there is a mere reference to the testator's wishes; which is followed in a different part of the deed by a simple provision for the burthens commonly belonging and incident to the subject-matter. The defendant is therefore entitled to a verdict on the first issue.

LORD DENMAN, C. J. There is nothing in this case but a great deal of ingenuity, and a little wilful blindness to the actual terms of the instrument itself. There is nothing whatever to show that the ground-rent was payable to a superior landlord; and the stipulation for the payment of it is not a mere proviso, but an express agreement. (His Lordship here read the proviso.) This is in terms an express agreement, and shows a sufficient legal consideration quite independent of the moral feeling which disposed the executors to enter into such a contract. Mr. Williams's definition of consideration is too large: the word *causa* in the passage referred to means one which confers what the law considers a benefit on the party. Then the obligation to repair is one which might impose charges heavier than the value of the life estate.

PATTESON, J. It would be giving to *causa* too large a construction if we were to adopt the view urged for the defendant: it would be confounding consideration with motive. Motive is not the same thing with consideration. Consideration means something which is of some value in the eye of the law, moving from the plaintiff: it may be some detriment to the plaintiff, or some benefit to the defendant; but at all events it must be moving from the plaintiff. Now that which is suggested as the consideration here — a pious respect for the wishes of the testator — does not in any way move from the plaintiff: it moves from the testator; therefore, legally speaking, it forms no part of the consideration. Then it is said that, if that be so, there is no consideration at all, it is a mere voluntary gift: but when we look at the agreement we find that this is not a mere proviso that the donee shall take the gift with the burthens; but it is an express agreement to pay what seems to be a fresh apportionment of a ground-rent, and which is made payable not to a superior landlord but to the executors. So that this rent is clearly not something incident to the assignment of the house; for in that case, instead of being payable to the executors, it would have been payable to the landlord. Then as to the repairs: these houses

¹ See Newland on Contracts, c. 24, p. 392, *et seq.*

may very possibly be held under a lease containing covenants to repair; but we know nothing about it: for any thing that appears, the liability to repair is first created by this instrument. The proviso certainly struck me at first as Mr. Williams put it, that the rent and repairs were merely attached to the gift by the donors; and, had the instrument been executed by the donors only, there might have been some ground for that construction; but the fact is not so. Then it is suggested that this would be held to be a mere voluntary conveyance as against a subsequent purchaser for value: possibly that might be so: but suppose it would: the plaintiff contracts to take it, and does take it, whatever it is, for better for worse: perhaps a *bona fide* purchase for a valuable consideration might override it; but that cannot be helped.

COLERIDGE, J. The concessions made in the course of the argument have in fact disposed of the case. It is conceded that mere motive need not be stated; and we are not obliged to look for the legal consideration in any particular part of the instrument, merely because the consideration is usually stated in some particular part: *ut res magis valeat*, we may look to any part. In this instrument, in the part where it is usual to state the consideration, nothing certainly is expressed but a wish to fulfil the intentions of the testator; but in another part we find an express agreement to pay an annual sum for a particular purpose, and also a distinct agreement to repair. If these had occurred in the first part of the instrument, it could hardly have been argued that the declaration was not well drawn, and supported by the evidence. As to the suggestion of this being a voluntary conveyance, my impression is that this payment of 1*l.* annually is more than a good consideration: it is a valuable consideration: it is clearly a thing newly created, and not part of the old ground-rent.

*Rule discharged.*¹

¹ In a commentary on the *Code Civil*, in *Codes Français Expliqués*, &c., by J. A. Rogron, Paris, 1836, the words of the *Code*, 'L'obligation sans cause, ou sur une fausse cause, ou sur une cause illicite, ne peut avoir aucun effet' (*ante*, p. 167), are discussed; and the note upon "sans cause" is as follows:—

"La cause est ce qui détermine l'engagement que prend une partie dans un contrat; il ne faut pas la confondre avec la cause implicite du contrat, autrement le motif qui porte à contracter. La cause de l'engagement d'une partie est le fait ou la promesse de l'autre partie; elle peut aussi consister dans une pure libéralité de la part de l'une des parties; ainsi, lorsque je m'oblige à payer mille francs à Paul, pour tels services que son père m'a rendus, la cause déterminante du contrat, ce sont les services qui m'ont été rendus; le motif qui m'a porté à contracter, c'est le désir de m'acquitter envers lui des services de son père; si celui-ci ne m'a jamais rendu les services dont il a été parlé dans l'acte, le contrat est sans cause. Je m'oblige à donner mille francs à Paul pour qu'il suive une affaire pendante devant le tribunal de la Seine: la cause déterminante est la promesse de Paul qu'il suivra mon affaire; si elle est jugée irrévocablement au moment où nous avons stipulé, le contrat est sans cause. Autre exemple: je vous vends ma maison; la cause de la vente est, d'un côté, la maison elle-même, de l'autre, le prix. Enfin je donne, dans la forme de dispositions entre vifs, ma maison à Paul, qui l'accepte: ma libéralité est ici la seule cause du contrat." p. 209.

SECTION II.

From whom the Consideration must move.

BOURNE v. MASON AND ANOTHER.

IN THE KING'S BENCH, HILARY TERM, 1669.

[*Reported in 1 Ventris, 6.*]

IN an assumpsit, the plaintiff declares, that, whereas one Parrie was indebted to the plaintiff and defendants in two several sums of money, and that a stranger was indebted in another sum to Parrie; that there being a communication between them, the defendants, in consideration that Parrie would permit them to sue, in his name, the stranger, for the sum due to him, promised that they would pay the sum which Parrie owed to the plaintiff; and alleged that Parrie permitted them to sue, and that they recovered. After non-assumpsit pleaded, and a verdict for the plaintiff, it was moved in arrest of judgment that the plaintiff could not bring his action, for he was a stranger to the consideration.

But in maintenance thereof, a judgment was cited in 1658, between Sprat and Agar, in the King's Bench, where one promised to the father, in consideration that he would give his daughter in marriage with his son, he would settle so much land. After the marriage the son brought the action; and it was adjudged maintainable. And another case was cited of a promise to a physician, that if he did such a cure he would give such a sum of money to himself and another to his daughter; and it was resolved the daughter might bring an assumpsit. Which cases the court agreed: for in the one case the parties that brought the assumpsit did the meritorious act, though the promise was made to another; and in the other case, the nearness of the relation gives the daughter the benefit of the consideration performed by her father; but here the plaintiff did nothing of trouble to himself or benefit to the defendant, but is a mere stranger to the consideration; wherefore it was adjudged *quod nil capiat per billam*.

DUTTON AND WIFE v. POOLE.

IN THE KING'S BENCH, MICHAELMAS TERM, 1677.

[*Reported in 2 Levinz, 210.*]

ASSUMPSIT, and declares that, the father of the plaintiff's wife being seised of a wood, which he intended to fell to raise portions for younger

children, the defendant, being his heir, in consideration the father would forbear to fell it at his request, promised the father to pay his daughter, now the plaintiff's wife, 1000*l.*, and avers that the father at his request forbore; but the defendant had not paid the 1000*l.* After verdict for the plaintiff upon non-assumpsit, it was moved in arrest of judgment, that the action ought not to be brought by the daughter, but by the father; or, if the father be dead, by his executors; for the promise was made to the father, and the daughter is neither privy nor interested in the consideration, nothing being due to her: also the father, notwithstanding this agreement with the son, might have cut down the wood, and then there was no remedy for the son, nor could the daughter have released the promise, and therefore she cannot have an action against him for not performing the promise. . . . On the other side it was said, if a man deliver goods or money to A. to deliver or pay to B., B. may have an action, because he is to have the benefit of the bailment; so here the daughter is to have the benefit of the promise: so if a man should say, Give me a horse, I will give your son 10*l.*, the son may bring the action, because the gift was upon consideration of a profit to the son, and the father is obliged by natural affection to provide for his children; for which cause, affection to children is sufficient to raise a use to them out of the father's estate; and therefore the daughter had an interest in the consideration and in the promise; and the son had a benefit by this agreement, for by this means he hath the wood, and the daughter is without a portion, which otherwise in all probability the son would have been left to pay, if the wood had not been cut down, nor this agreement between him and his father. . . . Upon the first argument, Wilde and Jones, Justices, seemed to think that the action ought to be brought by the father and his executors, though for the benefit of the daughter, and not by the daughter, being not privy to the promise nor consideration. Twysden and Rainsford seemed *contra*; and afterwards, two new judges being made, *scil.*, Scroggs, Chief Justice, in lieu of Rainsford, and Dolben, in lieu of Twysden, the case was argued again upon the reasons aforesaid; and now Scroggs, Chief Justice, said, that there was such apparent consideration of affection from the father to his children, for whom nature obliges him to provide, that the consideration and promise to the father may well extend to the children. . . . Dolben, Justice, concurred with him that the daughter might bring the action; Jones and Wylde *hesitabant*. But next day they also agreed to the opinion of the Chief Justice and Dolben; and so judgment was given for the plaintiff, for the son hath the benefit by having of the wood, and the daughter hath lost her portion by this means. . . . And *nota*, upon this judgment error was immediately brought; and Trin., 31 Car. 2, it was affirmed in the Exchequer Chamber.

CROW v. ROGERS.

IN THE KING'S BENCH, TRINITY TERM, 1724.

[Reported in 1 *Strange*, 592.]

IN assumpsit, the plaintiff declares that, whereas one John Hardy was indebted to the plaintiff in 70*l.*, upon a discourse between this Hardy and the defendant, it was agreed that the defendant should pay the plaintiff's debt of 70*l.*, and that Hardy should make the defendant a title to a house. Then he avers that Hardy was always ready to perform his part of the agreement, and that the defendant, in consideration thereof, promised to pay the plaintiff.

The defendant demurs; and it was insisted that there was no consideration moving from the plaintiff to support this promise.

The court gave no opinion. *Adjournatur*. And *Pasch.*, 12 Geo., it was moved again, and without much debate, the Court held the plaintiff was a stranger to the consideration, and gave judgment

Pro defendente.¹

PRICE v. EASTON.

IN THE KING'S BENCH, JANUARY 17, 1833.

[Reported in 4 *Barnewall & Adolphus*, 433.]

DECLARATION stated that one William Price was indebted to the plaintiff in the sum of 13*l.*, being the balance of a larger sum due for the price of a certain timber carriage sold and delivered to him; and that the defendant, in consideration thereof, and in consideration that the said William Price, at the request of the defendant, had undertaken and faithfully promised the defendant to work for him, the defendant, at certain wages agreed upon between them, and in consideration of William Price leaving the amount which might be earned by him in the defendant's hands, he, the defendant, undertook and promised to pay the plaintiff the sum of 13*l.* Averment that William Price did work for the defendant, and earned a large sum of money, and left the same in his, defendant's, hands. Breach, non-payment to the plaintiff of 13*l.* Plea, non-assumpsit. The plaintiff having obtained a verdict, a rule *nisi* was obtained by Campbell for arresting the judgment, on the ground that the plaintiff was a mere stranger to the consideration; and

¹ *Vide Bull. L. N. P.* 134.

he cited *Bourne v. Mason* and *Crow v. Rogers*; and distinguished the case from *Dutton v. Poole*, where tenant in fee-simple being about to cut down timber for his daughter's portion, the defendant, his heir-at-law, in consideration of his forbearing so to do, promised to pay a sum of money to the daughter, and the action by the husband of the daughter was held to be well brought; but there, it was said, there was privity by blood, and the daughter was prejudiced by loss of her portion.

Justice now showed cause. After verdict, it will be intended that every thing necessary to support the action was proved. An act from which the defendant receives a benefit, and from which inconvenience arises to the plaintiff, is a sufficient consideration to support an assumpsit. Here there was an advantage to the defendant, for he had the benefit of the labor of William Price, and was not bound to pay for it until the 31st of March. *Starkey v. Mylne*,¹ *Disborne v. Denabie*,² and *Wilson v. Coupland*,³ show that, where there is a privity between the three parties, assumpsit is maintainable without an immediate consideration from the plaintiff to the defendant. In *Dutton v. Poole* and *Curtis v. Collingwood*,⁴ there was no such consideration proceeding immediately from the plaintiff to the defendant. [PATTESON, J. No promise to the plaintiff is alleged; but merely a promise to pay the plaintiff.]

Campbell, Solicitor-General, (and *Talfourd* was with him,) *contra*, was stopped by the Court.

DENMAN, C. J. I think the declaration cannot be supported, as it does not show any consideration for the promise moving from the plaintiff to the defendant.

LITTLEDALE, J. No privity is shown between the plaintiff and defendant. This case is precisely like *Crow v. Rogers*, and must be governed by it.

TAUNTON, J. It is consistent with all the matter alleged in the declaration, that the plaintiff may have been entirely ignorant of the arrangement between William Price and the defendant.

PATTESON, J. After verdict, the Court can only intend that all matters were proved which were requisite to support the allegations in the declaration, or what is necessarily to be implied from them. Now it is quite clear that the allegations in this declaration are not sufficient to show a right of action in the plaintiff. There is no promise to the plaintiff alleged. The rule for arresting the judgment must be made absolute.

Rule absolute.

¹ 1 Roll. Abr. 32, pl. 13.

³ 5 B. & A. 228.

² 1 Roll. Abr. 31, pl. 5.

⁴ 1 Ventr. 297.

TWEDDLE v. ATKINSON, EXECUTOR OF GUY, DECEASED.

IN THE QUEEN'S BENCH, JUNE 7, 1861.

[Reported in 1 Best & Smith, 393.]

THE declaration stated that the plaintiff was the son of John Tweddle, deceased, and before the making of the agreement hereafter mentioned, married the daughter of William Guy, deceased; and before the said marriage of the plaintiff the said William Guy, in consideration of the then intended marriage, promised the plaintiff to give to his said daughter a marriage portion, but the said promise was verbal, and at the time of the making of the said agreement had not been performed, and before the said marriage the said John Tweddle, in consideration of the said intended marriage, also verbally promised to give the plaintiff a marriage portion, which promise at the time of the making of the said agreement had not been performed. It then alleged that after the marriage and in the lifetime of the said William Guy, and of the said John Tweddle, they, the said William Guy and John Tweddle, entering into the agreement hereafter mentioned as a mode of giving effect to their said verbal promises; and the said William Guy also entering into the said agreement in order to provide for his said daughter a marriage portion, and to procure a further provision to be made by the said John Tweddle, by means of the said agreement, for his said daughter, and acting for the benefit of his said daughter; and the said John Tweddle also entering into the said agreement in order to provide for the plaintiff a marriage portion, and to procure a further provision to be made by the said William Guy, by means of the said agreement, for the plaintiff, and acting for the benefit of the plaintiff; they the said William Guy and John Tweddle made and entered into an agreement in writing in the words following, that is to say:

HIGH CONISCLIFFE, July 11, 1855.

Memorandum of an agreement made this day between William Guy, of, &c., of the one part, and John Tweddle, of, &c., of the other part. Whereas it is mutually agreed that the said William Guy shall and will pay the sum of 200*l.* to William Tweddle, his son-in-law; and the said John Tweddle, father to the aforesaid William Tweddle, shall and will pay the sum of 100*l.* to the said William Tweddle, each and severally the said sums on or before the 21st day of August, 1855. And it is hereby further agreed by the aforesaid William Guy and the said John Tweddle that the said William Tweddle has full power to sue the said parties in any court of law or equity for the aforesaid sums hereby promised and specified.

And the plaintiff says that afterwards and before this suit, he and his said wife, who is still living, ratified and assented to the said agreement, and that he is the William Tweddle therein mentioned. And the plaintiff says that the said twenty-first day of August, A. D. 1855,

elapsed, and all things have been done and happened necessary to entitle the plaintiff to have the said sum of 200*l.* paid by the said William Guy or his executors: yet neither the said William Guy nor his executor has paid the same, and the same is in arrear and unpaid, contrary to the said agreement.

Demurrer and joinder therein.

Edward James, for the defendant. The plaintiff is a stranger to the agreement and to the consideration as stated in the declaration, and therefore cannot sue upon the contract. It is now settled that an action for breach of contract must be brought by the person from whom the consideration moved: *Price v. Easton*. (He was then stopped.)

Mellish, for the plaintiff. Admitting the general rule as stated by the other side, there is an exception in the case of contracts made by parents for the purpose of providing for their children. In *Dutton and Wife v. Poole*, affirmed in the Exchequer Chamber, a tenant in fee-simple being about to cut down timber to raise a portion for his daughter, the defendant, his heir-at-law, in consideration of his forbearing to fell it, promised the father to pay a sum of money to the daughter, and an action of assumpsit by the daughter and her husband was held to be well brought. [WIGHTMAN, J. In that case the promise was made before marriage. In this case the promise is post nuptial, and the whole consideration on both sides is between the two fathers.] The natural relationship between the father and the son constituted the father an agent for the son, in whose behalf and for whose benefit the contract was made; and therefore the latter may maintain an action upon it. [CROMPTON, J. Is the son so far a party to the contract that he may be sued as well as sue upon it? Where a consideration is required there must be mutuality. WIGHTMAN, J. This contract, so far as the son is concerned, is one-sided.] The object of the contract, which was that the children should be provided for, will be accomplished if this action is maintainable: whereas if the right of action remains in the father it will be defeated, because the damages recovered in that action will be his assets. [CROMPTON, J. Your argument will lead to this, that the son might bring an action against the father on the ground of natural love and affection.] In *Bourne v. Mason* two cases are cited which support this action. In *Sprat v. Agar*, in the King's Bench in 1658, one promised the father that, in consideration that he would give his daughter in marriage with his son, he would settle so much land; after the marriage the son brought an action, and it was held maintainable. The other was the case of a promise to a physician that if he did such a cure he would give such a sum of money to himself and another to his daughter, and it was resolved the daughter might bring assumpsit, "which cases," says the report, "the Court agreed;" and the reason assigned as to the latter is, "the nearness of the relation gives the daughter the benefit of the consideration performed by her father." There is no modern case in which the question

has been raised upon a contract between two fathers for the benefit of their children. [WIGHTMAN, J. If the father of the plaintiff had paid the 100*l.* which he promised, might not he have sued the father of the plaintiff's wife on his express promise?] According to the old cases he could not. When a father makes a contract for the benefit of his child, the law vests the contract in the child. In *Thomas v. —*,¹ the defendant promised to a father that, in consideration that he would surrender a copyhold to the defendant, the defendant would give unto his two daughters 20*l.* apiece; and after verdict in an action upon the case brought by one of the daughters for breach of that promise, on motion for arresting the judgment on the ground that the two ought to have joined, it was held that the parties had distinct interests, and so each might bring an action.

Edward James was not called upon to reply.

WIGHTMAN, J. Some of the old decisions appear to support the proposition that a stranger to the consideration of a contract may maintain an action upon it, if he stands in such a near relationship to the party from whom the consideration proceeds, that he may be considered a party to the consideration. The strongest of those cases is that cited in *Bourne v. Mason*, in which it was held that the daughter of a physician might maintain assumpsit upon a promise to her father to give her a sum of money if he performed a certain cure. But there is no modern case in which the proposition has been supported. On the contrary, it is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit.

CROMPTON, J. It is admitted that the plaintiff cannot succeed unless this case is an exception to the modern and well-established doctrine of the action of assumpsit. At the time when the cases which have been cited were decided the action of assumpsit was treated as an action of trespass upon the case, and therefore in the nature of a tort; and the law was not settled, as it now is, that natural love and affection is not a sufficient consideration for a promise upon which an action may be maintained; nor was it settled that the promisee cannot bring an action unless the consideration for the promise moved from him. The modern cases have, in effect, overruled the old decisions; they show that the consideration must move from the party entitled to sue upon the contract. It would be a monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage, and not a party to it for the purpose of being sued. It is said that the father in the present case was agent for the son in making the contract, but that argument ought also to make the son liable upon it. I am prepared to overrule the old decisions, and to hold that, by reason of the principles which now govern the action of assumpsit, the present action is not maintainable.

BLACKBURN, J. The earlier part of the declaration shows a contract which might be sued on, except for the enactment in sect. 4

¹ Sty. 461.

of the Statute of Frauds, 29 Car. 2, c. 3. The declaration then sets out a new contract, and the only point is whether, that contract being for the benefit of the children, they can sue upon it. Mr. Mellish admits that in general no action can be maintained upon a promise, unless the consideration moves from the party to whom it is made. But he says that there is an exception; namely, that when the consideration moves from a father, and the contract is for the benefit of his son, the natural love and affection between the father and son gives the son the right to sue as if the consideration had proceeded from himself. And *Dutton and Wife v. Poole* was cited for this. We cannot overrule a decision of the Exchequer Chamber; but there is a distinct ground on which that one cannot be supported. The cases upon stat. 27 El. c. 4, which have decided that, by sect. 2, voluntary gifts by settlement after marriage are void against subsequent purchasers for value, and are not saved by sect. 4, show that natural love and affection are not a sufficient consideration whereon an action of *assumpsit* may be founded.

Judgment for the defendant.

SECTION III.

What Contracts require a Consideration.

PILLANS AND ROSE v. VAN MIEROP AND HOPKINS.

IN THE KING'S BENCH, APRIL 30, 1765.

[*Reported in 3 Burrow, 1663.*]

ON Friday, 25th of January last, Mr. Attorney-General Norton, on behalf of the plaintiffs, moved for a new trial. He moved it as upon a verdict against evidence, the substance of which evidence was as follows:—

One White, a merchant in Ireland, desired to draw upon the plaintiffs, who were merchants at Rotterdam in Holland, for 800*l.* payable to one Clifford, and proposed to give them credit upon a good house in London for their reimbursement, or any other method of reimbursement.

The plaintiffs in answer desired a confirmed credit upon a house of rank in London as the condition of their accepting the bill. White names the house of the defendants as this house of rank, and offers credit upon them; whereupon the plaintiffs honored the draft, and paid the money, and then wrote to the defendants, Van Mierop and Hopkins, merchants in London (to whom White also wrote about the same time), desiring to know whether they would accept such bills as they,

the plaintiffs, should in about a month's time draw upon the said Van Mierop and Hopkins's house here in London for 800*l.* upon the credit of White; and they, having received their assent, accordingly drew upon the defendants. In the interim, White failed before their draft came to hand, or was even drawn; and the defendants gave notice of it to the plaintiffs, and forbid their drawing upon them, — which they nevertheless did: and therefore the defendants refused to pay their bills.

On the trial, a verdict was found for the defendants.

Upon shewing cause, on Monday, 11th February last, it turned upon the several letters that had respectively passed between the plaintiffs and defendants and White. The letters were read: first, those¹ from White & Co. in Ireland to the plaintiffs in Holland (by which it appears that Pillans and Rose had accepted the bills drawn upon them by White, payable to Clifford); then those of the plaintiffs to the defendants, and also White's to the defendants; then those of the defendants to the plaintiffs,² agreeing to honor their bill drawn on account of White; the letter from the defendants to the plaintiffs, informing them that White had stopped payment, and desiring them not to draw, as they could not accept their draft; and lastly, that which the plaintiffs wrote to the defendants, that they should draw on them, holding them not to be at liberty to withdraw from their engagement.

The counsel for the defendants were Mr. Serjeant *Davy* and Mr. *Wallace*. They observed that the plaintiffs had given credit to White above a month before the defendants had agreed to accept their draft. For it appears by White's letter of 16th February, 1762, that Pillans and Rose had then actually accepted Clifford's bills, but Van Mierop and Hopkins did not agree to honor their drafts till 19th of March, 1762; therefore the consideration was past and done before their promise was made. And they argued and principally insisted, that for one man to undertake to pay another man's debt was a void undertaking, unless there was some consideration for such undertaking; and that a mere general promise, without benefit to the promisor or loss to the promisee, was a *nudum pactum*. And they cited 1 Bulstr. 120, *Thorner v. Field*; *Dyer*, 272, pl. 31, *Hunt v. Bate*; 2 Vern. 224, 225, *Cecil et al. v. Earl of Salisbury*; 1 Ro. Abr. 11, pl. 1, letter Q, "Consideration executed;" *Yelv.* 40, 41; and 2 Strange, 933, *Hayes v. Warren*; where a past consideration was holden insufficient to raise an assumpsit.³

The counsel for the plaintiffs were Mr. *Attorney General*, Mr. *Walker*, and Mr. *Dunning*. They denied this to be a past consideration, and insisted that the liberty given to the plaintiffs to draw upon a confirmed house in London (which was prior to the undertaking by the defendants) was the consideration of the credit given by the plaintiffs to White's drafts, and that this was a good and sufficient consideration

¹ Dated 16th Feb. 1762.

² Dated 19th March, 1762.

³ See likewise *Hardres*, 72, 73, 74.

for the undertaking made by the defendants. It relates back to the original transaction. If any one promises to pay for goods delivered to a third person, such promise, being in writing, is a good one. And here White had had 800*l.* from the plaintiffs upon this assurance; and the defendants undertake in writing, in pursuance and completion of this original assurance, to be answerable for White's reimbursing the plaintiffs. And a promise in writing is out of the statute.

This case does not fall within those that have been cited; for Van Mierop and Hopkins have made themselves originally liable. An *ex post facto* event cannot alter the nature of an original promise. Their original promise made them liable, and bound them; and they are obliged, both by law, and in honor and honesty, to perform it. It is a mercantile transaction; and it must be considered, upon the whole of it, as an admittance that the defendants either had, or soon would have, effects of White's in their hands.

LORD MANSFIELD. The objection is, that the letter whereby Van Mierop and Hopkins undertake to honor the plaintiffs' bills is *nudum pactum*; the other side deny it. This is the only question here.

But this is quite different from what passed at the trial: the *nudum pactum* was not mentioned at that time. The grounds it was argued upon there were: 1st, That this imported to be a credit given to Pillans and Rose, in prospect of a future credit to be given by them to White, and that this credit might well be countermanded before the advancement of any money; and this is so; — 2d, That there was a fraud; for that Van Mierop and Hopkins had reason to think that White had sent goods to Pillans and Rose; whereas this was a mere lending of credit: — 3d, That if Pillans and Rose had received goods from White, and retained them till he failed, the defendants' undertaking was revocable.

I was then of opinion that Van Mierop and Hopkins were bound by their letter, unless there was some fraud upon them; for that they had engaged under their hands, in a mercantile transaction, to give credit for Pillans and Rose's reimbursement. And I did not see it to be future, as had been objected; nor did I see any fraud. And nothing was then urged about its being *nudum pactum*. I have no idea that promises for the debt of another are applicable to the present case. This is, as Mr. Walker said, a mercantile transaction, and it depends upon these letters from merchant to merchant about honoring bills to such an amount; and this credit is given upon a supposition that the person who is to draw upon the undertakers within a certain time has goods in his hands, or will have them. Here Pillans and Rose trusted to this undertaking; and there is no fraud. Therefore it is quite upon another foundation than that of a naked promise from one to pay the debt of another.

MR. JUSTICE WILMOT. I own the want of consideration at first occurred to me. But I now am satisfied that this case has nothing to do with the cases of undertakings by one to pay the debt of another. In

those cases it is settled, that where the consideration is past the action will not lie. And yet this seems a hard case. The mere promise to pay the debt of another, without any consideration at all, is *nudum pactum*. But the least spark of a consideration will be sufficient. It seems almost implied that there must be some consideration; but if there be none at all, it is *nudum pactum*. The statute must mean such a special promise as would have supported an action. But all this is out of the present case. So also I think is all the precedent correspondence. It lies in a narrow compass. White, Pillans and Rose, and Van Mierop and Hopkins, had all a correspondence together. They have intercourse together, mutually, in mercantile transactions. Pillans and Rose write to Van Mierop and Hopkins to know whether they will honor their drafts for 800*l.* in about a month's time. They say they will. Now it strikes me, as Mr. Walker said, that it admits that they either have assets or effects of White's in their hands, or that they have credit upon him. Now by this undertaking of a good house in London, and relying upon it, they are deluded and diverted from using any legal diligence to pursue White, or even not to part with any effects of his which they might have in their hands. Therefore this seems to be an irrevocable undertaking by Van Mierop and Hopkins, and they ought to be bound by it. Consequently there ought to be a new trial.

LORD MANSFIELD. A letter of credit may be given as well for money already advanced, as for money to be advanced in future. Let it be argued again the next term, and you shall have the opinion of the whole court.

Utterius Concilium.

Yesterday this matter accordingly came on again, and was argued by Mr. Wallace for the defendants, and by the same counsel as argued last term for the plaintiffs.

The latter repeated and enforced their arguments. They said the consideration moved from White to the defendants; not from the plaintiffs, Pillans and Rose, to the defendants. And as the defendants have undertaken for White, they can't revoke or retract their engagement. This case is not like the cases cited; some of which are strange cases and not founded on solid or sufficient reasons, and in others of them there was no meritorious consideration at all. And Mr. Walker cited Hardres, 71, Reynolds v. Prosser, where the consideration was adjudged sufficient, notwithstanding all the reasoning of Sir Thomas Hardres and all the cases cited by him. That was an assumpsit by a stranger, it consideration that the plaintiff would forbear to prosecute Lord Abergavenny upon a judgment, in the name of the original plaintiff, by virtue of a letter of attorney to receive it to his own use.

Serjeant Davy was heard this morning on behalf of the defendants, and urged that the plaintiffs gave credit to White upon his promising to reimburse them; and he said there was a fraudulent concealment of facts. White's first letter could have no influence on the plaintiffs, for they afterwards desired a confirmed credit upon a house of rank in Lon-

don; so that they did not rely on White's first letter, which offered credit on the defendants or any other method of reimbursement. And nothing had then passed between White and the defendants. For the first letter between them was on the 16th of February (a fortnight after); and then the defendants were deceived into a false opinion that it was for a future credit, and not to secure a past acceptance of White's bills by the plaintiffs. And this concealment of circumstances is sufficient to vitiate the contract. The plaintiffs had accepted a bill of 800*l.* of White's, a fortnight before the defendant's letter of 16th February; which bill the plaintiffs had accepted upon assurance of credit on a house in London to reimburse them. And this transaction was fraudulently concealed, both by White and the plaintiffs, from the defendants. If this had been disclosed, the defendants would have plainly seen that the plaintiffs doubted of White's sufficiency, by their requiring further security for his already contracted debt. All letters of credit relate to future credit, not to debts before incurred; nor can the advancer of money thereupon include an old debt before incurred. A bill cannot be accepted before it is drawn. This is only a promise to accept; for it is only a promise to honor the bill, not a promise to pay it. A promise to pay a past debt of another person is void at common law for want of consideration, unless there be at least an implied promise from the debtee to forbear suing the original debtor. But here was a debt clearly contracted by White with the plaintiffs on the credit of White; and there is no promise from the plaintiffs to forbear suing White. A naked promise is a void promise: the consideration must be executory, not past or executed.

Lord Mansfield asked if any case could be found where the undertaking holden to be a *nudum pactum* was in writing.

Serjeant *Davy*. It was anciently doubted whether a written acceptance of a bill of exchange was binding for want of a consideration. It is so said somewhere in *Lutwyche*.

LORD MANSFIELD. This is a matter of great consequence to trade and commerce, in every light. If there was any kind of fraud in this transaction, the collusion and *mala fides* would have vacated the contract. But from these letters it seems to me clear that there was none. The first proposal from White was to reimburse the plaintiffs by a remittance, or by credit on the house of Van Mierop: this was the alternative he proposed. The plaintiffs chose the latter. Both the plaintiffs and White wrote to Van Mierop and Company. They answered that they would honor the plaintiffs' drafts, So that the defendants assent to the proposal made by White, and ratify it. And it does not seem at all that the plaintiffs then doubted of White's sufficiency, or meant to conceal any thing from the defendants. If there be no fraud, it is a mere question of law. The law of merchants and the law of the land is the same. A witness cannot be admitted to prove the law of merchants. We must consider it as a point of law. A *nudum pactum* does not exist in the usage and law of merchants.

I take it that the ancient notion about the want of consideration was for the sake of evidence only: for when it is reduced into writing, as in covenants, specialties, bonds, &c.,¹ there was no objection to the want of consideration; and the Statute of Frauds proceeded upon the same principle. In commercial cases, amongst merchants, the want of consideration is not an objection.

This is just the same thing as if White had drawn on Van Mierop and Hopkins, payable to the plaintiffs. It had been nothing to the plaintiffs whether Van Mierop and Company had effects of White's in their hands or not, if they had accepted his bill. And this amounts to the same thing: "I will give the bill due honor" is, in effect, accepting it. If a man agrees that he will do the formal part, the law looks upon it (in the case of an acceptance of a bill) as if actually done. This is an engagement to accept the bill, if there was a necessity to accept it, and to pay it when due; and they could not afterwards retract. It would be very destructive to trade, and to trust in commercial dealing, if they could. There was nothing of *nudum pactum* mentioned to the jury; nor was it, I dare say, at all in their idea or contemplation. I think the point of law is with the plaintiffs.

MR. JUSTICE WILMOT. The question is, whether this action can be supported upon the breach of this agreement. I can find none of those cases that go upon its being *nudum pactum* that are in writing: they are all upon parol. I have traced this matter of the *nudum pactum*, and it is very curious.

He then explained the principle of an agreement being looked upon as a *nudum pactum*, and how the notion of a *nudum pactum* first came into our law. He said it was echoed from the civil law: *Ex nudo pacto non oritur actio*. Vinnius gives the reason, in lib. 3, tit. *De Obligationibus*, 4to edition, 596. If by stipulation (and, *a fortiori*, if by writing), it was good without consideration. There was no radical defect in the contract for want of consideration. But it was made requisite, in order to put people upon attention and reflection, and to prevent obscurity and uncertainty; and, in that view, either writing or certain formalities were required. *Idem*, on Justinian, 4to edit., 614. Therefore it was intended as a guard against rash, inconsiderate declarations. But if an undertaking was entered into upon deliberation and reflection, it had activity; and such promises were binding. Both Grotius and Puffendorff held them obligatory by the law of nations. Grot., lib. 2, c. 11, *De Promissis*; Puffend., lib. 3, c. v. They are morally good, and only require ascertainment; therefore there is no reason to extend the principle, or carry it further.

There would have been no doubt upon the present case, according to the Roman law; because here is both stipulation (in the express Roman form) and writing. Bracton, who wrote² *temp. Hen. 3*, is the first of our lawyers that mentions this. His writings interweave a great many

¹ *Vide* 3 Burr. 1639.

² *Sub ultima tempora Regis H. 3.*

things out of the Roman law. In his third book, cap. 1, *De Actionibus*, he distinguishes between naked and clothed contracts. He says that *obligatio est mater actionis*; and that it may arise *ex contractu, multis modis*; *sicut ex conventionione*, &c.; *sicut sunt pacta, conventa, quæ nuda sunt aliquando, aliquando vestita*, &c.

Our own lawyers have adopted exactly the same idea as the Roman law. Plowden, 308 b,¹ in the case of *Sharrington and Pledall v. Strotton* and others, mentions it; and no one contradicted it. He lays down the distinction between contracts or agreements in words (which are more base), and contracts or agreements in writing (which are more high); and puts the distinction upon the want of deliberation in the former case, and the full exercise of it in the latter. His words are the marrow of what the Roman lawyers had said: "Words pass from men lightly." But where the agreement is made by deed, there is more stay, &c. For, first, there is, &c.; and, thirdly, he delivers the writing as his deed. The delivery of the deed is a ceremony in law, signifying fully his good-will that the thing in the deed should pass from him who made the deed to the other; and therefore a deed, which must necessarily be made upon great thought and deliberation, shall bind without regard to the consideration. The voidness of the consideration is the same in reality in both cases: the reason of adopting the rule was the same in both cases, though there is a difference in the ceremonies required by each law; but no inefficacy arises merely from the naked promise. Therefore, if it stood only upon the naked promise, its being in this case reduced into writing, is a sufficient guard against surprise; and therefore the rule of *nudum pactum* does not apply in the present case.

I cannot find that a *nudum pactum* evidenced by writing has ever been holden bad, and I should think it good; though where it is merely verbal, it is bad; yet I give no opinion upon its being good always, when in writing. Many of the old cases are strange and absurd; so also are some of the modern ones, particularly that of *Hayes v. Warren*.² It is now settled, that where the act is done at the request of the person promising, it will be a sufficient foundation to graft the promise upon. In another instance the strictness has been relaxed; as, for instance, burying³ a son, or curing⁴ a son. The considerations were both past, and yet holden good. It has been melting down into common sense of late times.

However, I do here see a consideration. If it be a departure from any right, it will be sufficient to graft a verbal promise upon. Now

¹ This probably was Plowden's own argument. I suppose he was himself that apprentice of the Middle Temple who argued for the defendants.

² *Vide* 2 Sir J. S. 933. I have a very full note of this case. The reason of the reversal of the judgment was, that it did not appear by the declaration to be either for the benefit or at the request of the defendant.

³ *Church and Church's Case*, cited in T. Raym. 260.

⁴ *Vide* 2 Leon. 111.

here, White, living in Ireland, writes to the plaintiffs to honor his draft for 800*l.*,¹ payable ten weeks after. The plaintiffs agree to it, on condition that they be made safe at all events. White offers good credit on a house in London, and draws; and the plaintiffs accept his draft. Then White writes to them to draw on Van Mierop and Hopkins; to whom the plaintiffs write, to inquire if they will honor their draft. They engage that they will. This transaction has prevented, stopped, and disabled the plaintiffs from calling upon White for the performance of his engagement; for White's engagement is complied with, so that the plaintiffs could not call upon him for this security. I do not speak of the money, for that was not payable till after two usances and a half. But the plaintiffs were prevented from calling upon White for a performance of his engagement to give them credit on a good house in London for reimbursement; so that here is a good consideration. The law does not weigh the *quantum* of the consideration. The suspension of the plaintiffs' right to call upon White for a compliance with his engagement is sufficient to support an action, even if it be a suspension of the right for a day only, or for ever so little a time.

But to consider this as a commercial case. All nations ought to have their laws conformable to each other in such cases. *Fides servanda est; simplicitas juris gentium praevaleat. Hodierni mores* are such, that the old notion about the *nudum pactum* is not strictly observed, as a rule. On a question of this nature, whether by the law of nations such an engagement as this shall bind, the law is to judge.

The true reason why the acceptance of a bill of exchange shall bind is not on account of the acceptor's having, or being supposed to have, effects in hand, but for the convenience of trade and commerce. *Fides est servanda.* An acceptance for the honor of the drawer shall bind the acceptor; so shall a verbal acceptance. And whether this be an actual acceptance, or an agreement to accept, it ought equally to bind. An agreement to accept a bill to be drawn in future would (as it seems to me), by connection and relation, bind on account of the antecedent relation; and I see no difference between its being before or after the bill was drawn. Here was an agreement sufficient to bind the defendants to pay the bill; agreeing to honor it is agreeing to pay it. I see no sort of fraud. It rather seems as if the defendants had effects of White's in their hands; and it does not appear to me that the defendants would not have honored the plaintiffs' drafts, even though they had known that it was future credit. But whether the plaintiffs or the defendants had effects of White's in their hands or not, we must determine on the general doctrine; and I am of opinion that there ought to be a new trial.

MR. JUSTICE YATES was of the same opinion. He said it was a case of great consequence to commerce; and, therefore, he would give both

¹ For between Ireland and Holland each usance is one month.

his opinion and his reasons. The arguments on the side of the defendants terminate in its being a *nudum pactum*, and therefore void. This depends upon two questions: 1st question, — Whether this be a promise without a consideration; 2d question, — If it is, then whether this promise shall not be binding of itself, without any consideration.

First, the draft drawn by White on the plaintiffs, payable to Clifford, is no part of the consideration of the undertaking by the defendants. The draft payable to Clifford is never mentioned to the defendants. They are asked whether they will answer a draft from the plaintiffs upon them. They answer, they will honor such a draft on them. Whether the defendants had or had not effects of White's in their hands is immaterial. Any damage¹ to another, or suspension, or forbearance of his right, is a foundation for an undertaking, and will make it binding, though no actual benefit accrues to the party undertaking. Now here the promise and undertaking of the defendants did occasion a possibility of loss to the plaintiffs. It is plain that the plaintiffs would not rely on White's assurance only, but wrote to the defendants to know if they would accept their drafts. The credit of the plaintiffs might have been hurt by the refusal of the defendants to accept White's bills. They were, or might have been, prevented from resorting to him, or getting further security from him. It comes within the cases of promises where the debtee forbears suing the original debtor.

Second question, — Whether, by the law of merchants, this contract is not binding on the defendants, though it was without consideration. The acceptance of a bill of exchange is an obligation to pay it. The end of their institution, their currency, requires that it should be so. On this principle, bills of exchange are considered and are declared upon as special contracts, though legally they are only simple contracts. The declaration sets forth the bill and acceptance specifically, and that thereby the defendants, by the custom of merchants, became liable to pay it. This agreement to honor their bill was a virtual acceptance of the bill. An acceptance needs not be upon the bill itself: it may be by collateral writing. *Wilkinson v. Lutwidge*, 1 Strange, 648. A promise to accept is the same as an actual acceptance, and a small matter amounts to an acceptance; and so says *Molloy*, lib. 2, c. 10, § 20. And an acceptance will bind, though the acceptor has no effects of the drawer in his hands, and without any consideration. *Symons v. Parminter*,² Hil. 1747, 21 G. 2, B. R. And a bill accepted for the honor of the drawer will also bind.

Then he applied these positions to the present case. It was an acceptance of this very draft by relation and connection, though the bill was not then drawn by the plaintiffs on the defendants. But even if it did not amount to an actual acceptance, yet it would equally bind

¹ *Vide Coggs v. Bernard*, 2 Lord Raym. 919.

² This was on a motion in arrest of judgment. The judgment was affirmed (*ex parte*) in Dom. Proc. with 100*l.* costs, upon or soon after 20th Feb. 1748.

the defendants: they would be equally obliged to perform the effect of their undertaking. The plaintiffs apprised the defendants of their intention to draw, and the defendants promised to honor their draft; and the plaintiffs of course would regulate their conduct accordingly. Therefore, upon the whole circumstances of this transaction: 1st, There is a consideration; and, 2d, If there was none, yet in this commercial case the defendants would be bound.

MR. JUSTICE ASTON. I am of opinion that there ought to be a new trial. If there be such a custom of merchants as has been alleged, it may be found by a jury; but it is the court, not the jury, who are to determine the law. This must be considered as a commercial transaction, and is a plain case. The defendants have undertaken to honor the plaintiffs' draft; therefore they are bound to pay it. This cannot be called a *nudum pactum*. The answer returned by the defendants is an admission of having effects of White's in their hands, if that were necessary. And after this promise to accept (which is an implied acceptance), they might have applied any thing of White's that they had in their hands to this engagement, even though White had drawn other bills upon them in the interim. The defendants voluntarily engaged to the plaintiffs, and they could not recede from their engagement. As to its being a *nudum pactum* (which matter has been already so well explained), if there be turpitude or illegality in the consideration of a note, it will make it void, and may be given in evidence. But here nothing of that kind appears, nor any thing like fraud in the plaintiffs. Here was full notice of all the facts; a clear apprehension of them by the defendants; a question put to them, whether they would accept; and their answer, that they would. Upon the whole he concurred, that an action will lay for the plaintiffs against them; and that the plaintiffs ought to recover.

By THE COURT unanimously the rule to set aside the verdict, and for a new trial, was made absolute.

WILLIAMSON AND WIFE v. LOSH, *Executor*.

IN THE KING'S BENCH, MICHAELMAS TERM, 1775.

[Reported in *Chitty on Bills*, 9th ed., p. 75, note (x).]

THIS was an action of assumpsit against the defendant, as executor of John Losh, deceased, upon the following promissory note:—

“I, John Losh, for the love and affection that I have for Jane Tiffin, my wife's sister's daughter, do promise that my executors, administrators, or assigns, shall pay to her the sum of 100*l.* of money, one year after my decease, and a caldron, and a clock, a wainscot chest, and a

bed and bed-clothes, seven pudden-dishes: as witness my hand this 16th day of February, 1763.

“ Witnessed by us, A. B., C. D.”

Jane Tiffin afterwards intermarried with the plaintiff. Upon the trial, a verdict was found for the plaintiff, and a case reserved. The defendant admitted he had proved the will, and had assets sufficient to cover the damages, but contended that there was no consideration in point of law, and that the note could not be recovered upon, and that, as the testator was not bound, the executor was not. The court held that the instrument being in writing and attested by witnesses, the objection of *nudum pactum* did not lie, and ordered the *postea* to the plaintiff.

RANN AND ANOTHER, *Executors of MARY HUGHES, v. ISABELLA HUGHES, Administratrix of J. HUGHES.*

IN THE HOUSE OF LORDS, MAY 14, 1778.

[*Reported in 7 Term Reports, 350, note (a).*]

THE declaration stated that on the 11th of June, 1764, divers disputes had arisen between the plaintiffs' testator and the defendant's intestate, which they referred to arbitration; that the arbitrator awarded that the defendant's intestate should pay to the plaintiffs' testator 983*l.*; that the defendant's intestate afterwards died possessed of effects sufficient to pay that sum; that administration was granted to the defendant; that Mary Hughes died, having appointed the plaintiffs her executors; that at the time of her death the said sum of £983 was unpaid: by reason of which premises the defendant, as administratrix, became liable to pay to the plaintiffs, as executors, the said sum; and being so liable, she, in consideration thereof, undertook and promised to pay, &c. The defendant pleaded *non assumpsit, plene administravit*, and *plene administravit* except as to certain goods, &c., which were not sufficient to pay an outstanding bond-debt of the intestate's therein set forth, &c. The replication took issue on these pleas. Verdict for the plaintiff on the first issue, and for the defendant on the two last; and on the first a general judgment was entered in B. R. against the defendant *de bonis propriis*. This judgment was reversed in the Exchequer Chamber; and a writ of error was afterwards brought in the House of Lords, where, after argument, the following question was proposed to the judges by the Lord Chancellor; Whether sufficient matter appeared upon the declaration to warrant after verdict the judgment against the defendant in error in her personal capacity; upon which the Lord Chief Baron Skynner delivered the opinion of the judges to this effect: It is undoubtedly true that every man is, by the law of nature, bound to fulfil his engagements. It is equally true

that the law of this country supplies no means, nor affords any remedy, to compel the performance of an agreement made without sufficient consideration. Such agreement is *nudum pactum, ex quo non oritur actio*; and whatsoever may be the sense of this maxim in the civil law, it is in the last-mentioned sense only that it is to be understood in our law. The declaration states that the defendant, being indebted as administratrix, promised to pay when requested; and the judgment is against the defendant generally. The being indebted is of itself a sufficient consideration to ground a promise; but the promise must be coëxtensive with the consideration, unless some particular consideration of fact can be found here to warrant the extension of it against the defendant in her own capacity. If a person indebted in one right, in consideration of forbearance for a particular time, promise to pay in another right, this convenience will be a sufficient consideration to warrant an action against him or her in the latter right; but here no sufficient consideration occurs to support this demand against her in her personal capacity, for she derives no advantage or convenience from the promise here made. For if I promise generally to pay upon request what I was liable to pay upon request in another right, I derive no advantage or convenience from this promise, and therefore there is not sufficient consideration for it. But it is said that if this promise is in writing, that takes away the necessity of a consideration, and obviates the objection of *nudum pactum*, for that cannot be where the promise is put in writing; and that, if it were necessary to support the promise that it should be in writing, it will, after verdict, be presumed that it was in writing; and this last is certainly true; but that there cannot be *nudum pactum* in writing, whatever may be the rule of the civil law, there is certainly none such in the law of England. His Lordship observed, upon the doctrine of *nudum pactum* delivered by Mr. J. Wilmot in the case of *Pillans v. Van Mierop and Hopkins*, 3 Burr. 1663, that he contradicted himself, and was also contradicted by Vinnius in his comment on Justinian.

All contracts are by the laws of England distinguished into agreements by specialty, and agreements by parol; nor is there any such third class, as some of the counsel have endeavored to maintain, as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved. But it is said that the Statute of Frauds has taken away the necessity of any consideration in this case: the Statute of Frauds was made for the relief of personal representatives and others, and did not intend to charge them further than by common law they were chargeable. His Lordship here read those sections of that statute which relate to the present subject. He observed that the words were merely negative, and that executors and administrators should not be liable out of their own estates, unless the agreement upon which the action was brought, or some memorandum thereof, was in writing and signed by the party. But this does not prove that the agreement was still not liable to be tried and judged

of as all other agreements merely in writing are by the common law, and does not prove the converse of the proposition, that when in writing the party must be at all events liable. He here observed upon the case of *Pillans v. Van Mierop*, in Burr., and the case of *Losh v. Williamson*, Mich. 16 G. 3, in B. R.; and so far as these cases went on the doctrine of *nudum pactum*, he seemed to intimate that they were erroneous. He said that all his brothers concurred with him that in this case there was not a sufficient consideration to support this demand as a personal demand against the defendant, and that its being now supposed to have been in writing makes no difference. The consequence of which is that the question put to us must be answered in the negative.

And the judgment in the Exchequer Chamber was affirmed.¹

¹ In 7 Brown's Parliament Cases, 550 (vol. 4 of Tomlin's ed., p. 27), the arguments of counsel are given. Upon the question of consideration, F. Buller and J. Dunning, for the plaintiffs in error, argued as follows:—

"In the case of a promise in writing, which this must be taken to be [and which they said it was in fact], it is not necessary to allege any consideration in the declaration; but if it were necessary, there was a sufficient consideration for the promise appearing upon this declaration. In reason, there is little or no difference between a contract which is deliberately reduced into writing, and signed by the parties, without seal, and a contract under the same circumstances, to which a party at the time of signing it puts a seal, or his finger on cold wax. In the case of a deed, *i. e.*, an instrument under seal, it must be admitted that no consideration is necessary; and in the year 1765 it was solemnly adjudged in the Court of King's Bench, *Pillans v. Van Mierop*, 3 Burr. 1663, that no consideration was necessary when the promise was reduced into writing. That opinion has since been recognized in the same court, and several judgments founded upon it; all which judgments must be subverted, and what was there conceived to be settled law totally overturned, if the plaintiffs in this cause were not entitled to recover. But further: if a consideration were necessary, a sufficient one for the promise appeared upon the declaration in this case. The defendant was the administratrix of John Hughes, she had effects of his in her hands, she was liable to be called upon by the plaintiffs in an action, to show to what amount she had effects, and how she had applied them; and under these circumstances she promised to pay the demand which the plaintiffs had against her. But it was said, that it did not appear on the declaration that she had effects of John Hughes sufficient to pay all his debts. To what amount she had effects, or what debts were due from Hughes at his death, was known to the defendant only, and not to the plaintiffs. They applied to the person against whom they had a right of action; she promised to pay them, and under that promise they rested satisfied. This promise, if it did not import an admission of effects, must naturally be understood to mean that the defendant would pay the debt whether she had effects or not; and if it was not so meant, it could only be intended to amuse, mislead, and deceive the plaintiffs. And after such a promise the defendant ought not to be permitted to say that she had not sufficient assets to pay this debt."—Ed.

SECTION IV.

Sufficiency of Consideration in General.

SMITH AND SMITH'S CASE.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1583.

[Reported in 3 Leonard, 88.]

LAMBERT SMITH, executor of Tho. Smith, brought an action upon the case against John Smith, that whereas the testator, having divers children infants, and lying sick of a mortal sickness, being careful to provide for his said children infants, the defendant, in consideration the testator would commit the education of his children, and the disposition of his goods after his death, during the minority of his said children, for the education of the said children, to him, promised to the testator to procure the assurance of certain customary lands to one of the children of the said testator; and declared further, that the testator thereupon constituted the defendant overseer of his will, and ordained and appointed by his will that his goods should be in the disposition of the defendant, and that the testator died, and that by reason of that will, the goods of the testator to such a value came to the defendant's hands to his great profit and advantage. And upon *non assumpsit* pleaded, it was found for the plaintiff. And upon exception to the declaration in arrest of judgment for want of sufficient consideration, it was said by WRAY, C. J., that here is not any benefit to the defendant that should be a consideration in law to induce him to make this promise; for the consideration is no other but to have the disposition of the goods of the testator *pro educatione liberorum*. For all the disposition is for the profit of the children; and notwithstanding that such overseers commonly make gain of such disposition, yet the same is against the intendment of the law, which presumes every man to be true and faithful if the contrary be not showed; and therefore the law shall intend that the defendant hath not made any private gain to himself, but that he hath disposed of the goods of the testator to the use and benefit of his children according to the trust reposed in him. Which AYLIFFE, J., granted; GAWDY, J., was of the contrary opinion. And afterwards by award of the Court it was that the plaintiff *nihil capiat per billam*.

REYNOLDS v. PINHOWER.

IN THE QUEEN'S BENCH, TRINITY TERM, 1595.

[Reported in *Croke Elizabeth*, 429.]

ASSUMPSIT. Whereas the defendant had recovered five pounds against the plaintiff; in consideration of four pounds given him by the plaintiff, that the defendant assumed to acknowledge satisfaction of that judgment before such a day; and that he had not done it. And it was thereupon demurred; for it was moved that there was not any consideration, for it is no more than to give him a part of the money which he owed him, which is not any consideration. But all the Court held it to be well enough; for it is a benefit unto him to have it without suit or charge; and it may be there was error in the record, so as the party might have avoided it. Wherefore it was adjudged for the plaintiff.

DIXON v. ADAMS.

IN THE EXCHEQUER CHAMBER, MICHAELMAS TERM, 1596.

[Reported in *Croke Elizabeth*, 538.]

ASSUMPSIT. For that J. S. and J. D. were obliged to Adams in 40*l.*, and thereupon he sued J. S. in the Queen's Bench, in which suit Dixon became bail. Adams recovered, and, upon a *scire facias* against Dixon the bail had judgment against him; and he without other process paid the condemnation, and Adams *in consideratione inde* assumed to Dixon to deliver unto him the principal obligation, and a letter of attorney to sue it against J. D.: and for non-performance hereof the action was brought; and upon *non assumpsit* pleaded, and found for the plaintiff, he had judgment: and thereupon error brought, because it was not a sufficient consideration. And so it was held by the whole Court; for Dixon had not done any act whereto the law would not have compelled him. Wherefore the judgment was reversed.

SIR ANTHONY STURLYN v. ALBANY.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1587.

[Reported in *Croke Elizabeth*, 67.]

ASSUMPSIT. The case was, the plaintiff had made a lease to J. S. of land for life, rendering rent. J. S. grants all his estate to the defend-

ant; the rent was behind for divers years; the plaintiff demands the rent of the defendant, who assumed that if the plaintiff could show to him a deed that the rent was due, that he would pay to him the rent and the arrearages; the plaintiff allegeth that upon such a day of, &c., at Warwick, he showed unto him the indenture of lease by which the rent was due, and notwithstanding he had not paid him the rent and the arrearages due for four years. Upon *non assumpsit* pleaded, it was found for the plaintiff, and damages assessed to so much as the rent and arrearages did amount unto. And it was moved in arrest of judgment, that there was no consideration to ground an action; for it is but the showing of the deed, which is no consideration. 2. The damages ought only to be assessed for the time the rent was behind, and not for the rent and the arrearages; for he hath other remedy for the rent; and a recovery in this action shall be no bar in another action. But it was adjudged for the plaintiff: for when a thing is to be done by the plaintiff, be it never so small, this is a sufficient consideration to ground an action; and here the showing of the deed is a cause to avoid suit; and the rent and arrearages may be assessed all in damages. But they took order that the plaintiff should release to the defendant all the arrearages of rent before execution should be awarded.

Nota. In this case it was alleged that it hath been adjudged, when one assumeth to another, that if he can show him an obligation in which he was bound to him, that he would pay him, and he did show the obligation, &c., that no action lieth upon this *assumpsit*; which was affirmed by the justices.

BRET v. J. S. AND WIFE.

IN THE COMMON PLEAS, EASTER TERM, 1600.

[Reported in *Croke Elizabeth*, 756.]

ASSUMPSIT. The case was, that William Dracot, first husband to the *feme*, sent his son to table with the plaintiff for three years, and agreed to give unto him for every year 8*l.*, and died within the year. The *feme*, during her widowhood, in consideration of her natural affection to the son, and in consideration that the son should continue during the residue of the time with the plaintiff, promised to the plaintiff to pay unto him 6*l.* 13*s.* 4*d.* for the tabling of the son for the time past, and 8*l.* for every year after that he should continue there with the plaintiff. Afterwards she married the defendant, and the plaintiff brought his action as well for the 6*l.* 13*s.* 4*d.* as for the tabling for the two years following.

Warburton moved, that this action lay not. First, because it was

an entire contract by her first husband for the entire year, which cannot be apportioned. Secondly, because natural affection is not sufficient to ground an assumpsit without *quid pro quo*. Thirdly, that this is a contract for which action of debt lies, and not this action.

But all the Court held, that it well lay. For as to the first, it is well apportionable; because, it being for tabling which he had taken, there ought to be a recompense, although he departed within the year, or that the contractor died within the year. To the second, they agreed that natural affection of itself is not a sufficient consideration to ground an assumpsit; for although it be sufficient to raise a use, yet it is not sufficient to ground an action, without an express *quid pro quo*. But it is here good, because it is not only in consideration of affection, but that her son should afterwards continue at his table, which is good as well for the money due before, as for what should afterwards become due. And as to the third, true it is that, if the contract had been only for the tabling afterwards, then debt would have lain, and not this action; but in regard it is conjoined with another thing for which he could not have an action of debt (as it is here for this 6*l.* 13*s.* 4*d.*), an action upon the case lies for all (as debt with other things may be put into an arbitrament). Wherefore it was adjudged for the plaintiff.

KENT v. PRATT.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1610.

[Reported in 1 Rolle's Abridgment, 23, placita 27, 28.]

If A. lease land to B. at will, and A. assume to B. that, in consideration that he will surrender the said estate at will to him, he will provide a parsonage for J. S., this is not a good consideration to support an action, because he could determine this estate at will at his pleasure.

It was alleged in the declaration that B. was possessed of a term, without showing what term; and therefore the court took it to be a lease at will. But if it had been alleged that there was a controversy between A. and B. whether this was a lease at will or for years, and thereupon the assumpsit made as before, this had been a good consideration.

BARNARD *v.* SIMONS.

WRIT OF ERROR AT SERJEANTS' INN, MICHAELMAS TERM, 1616.

[Reported in 1 Rolle's Abridgment, 26, placitum 39.]

IF A. makes a void assumpsit to B., and afterwards a stranger comes to B., and, in consideration that B. will relinquish the assumpsit made to him by A., he promises to pay him 10*l.*, this is not a good consideration to charge him, because the first assumpsit was void.

TRAVER *v.* ———.

IN THE KING'S BENCH, MICHAELMAS TERM, 1661.

[Reported in 1 Siderfin, 57.]

A WOMAN, after the death of her husband, said to one of his creditors that, if he would prove that her husband owed him 20*l.*, she would pay it; and upon this assumpsit the creditor brought an action on the case against the woman, without any proof made before the action brought; but in this action it was found by verdict that her husband owed him that amount. And it was moved in arrest of judgment that this action was not well brought, for he ought to have proved the debt to entitle himself to the action, and ought to have proved it before action brought.

But upon several debates the Court held clearly that the action was well brought, and that the plaintiff should have judgment. And it is not requisite to make any proof of it before action brought, but it can more properly and more naturally be tried in this action. And TWYSDEN, J. cited a case, 15 Jac., between Grinden and ———, which was, "In consideration you'll prove I have beaten your son, I'll pay you so much" (naming the sum), and adjudged that he can bring an action before any proof made, in which, if he proves it, he shall recover; and it was said that the law is the same in the case of a wager. Also it was not denied by any but that this is a good consideration to support an action against the woman, though she was not administratrix, *sed qua* stranger; for it is a trouble and charge to the plaintiff to make the proof, though it is not any benefit to the woman.¹

¹ "Nota. A., upon receipt of 1*s.* from B., assumed and promised that, if B. could prove that A. had beaten him in the chancel of such a church, he would pay him 20*l.* B. brought assumpsit upon this promise. A. pleaded *non assumpsit*, and the issue was found for the plaintiff. And it was moved in arrest of judgment that he brought the action before any duty accrued to him: for there was no duty before he had proved a battery in the chancel; and if that be found, then an action accrues to

PAYNTER v. CHAMBERLYN.

IN THE KING'S BENCH, TRINITY TERM, 1639.

[Reported in 1 Rolle's Abridgment, 22, placitum 21.]

IF A. be indebted to B. in 200*l.*, and appoints B. to receive it of C., and, for the better satisfaction of B., A. delivers certain bills of exchange to one D., the factor of B., for the payment of it, and thereupon C. promises B. that, in consideration that said bills of exchange so delivered to D. be delivered to him, C., he will pay the said 200*l.* due by A. to B., this is a good promise, for the consideration is valuable; for though C. can do nothing with the bills, being a stranger to them, yet it may be of some advantage to him to have possession of them, and at least it may be a prejudice to B.; and therefore the consideration is good.

HAWES v. SMITH.

IN THE KING'S BENCH, HILARY TERM, 1675.

[Reported in 2 Levinz, 122.]

ERROR of a judgment in assumpsit in *Com. Banco* against the defendant, an executor, wherein the plaintiff declared that, whereas the testator was indebted to him, the defendant assumed, in consideration the plaintiff at his request had accounted with him, upon which he was found so much in arrear, to pay it. The plaintiff had judgment in *Com. Banco de bonis propriis* of the executor; and this was assigned for error, but overruled as no error, for the plaintiff was not bound to account with the executor, and yet he did account at the request of the executor. Et per HALE. Though a bare account will not oblige an executor to pay *de bonis propriis*, yet a promise in consideration of forbearance will; and the case is all one, for it must be intended that an express request was made to account, and thereupon an express promise to pay; otherwise the evidence would not support the declaration. Whereupon judgment was affirmed *per totam curiam*.

him. But Dodderidge and Chamberlaine (*absentibus* the other justices) held clearly that the action lies before, and this trial and proof of the battery shall be by the same jury which tries the assumpsit. Otherwise if he had said, "After that you have proved that I struck you, &c., then I do assume to pay you 20*l.*" And it was said that it was so in 18 E. 4, and that it was so adjudged in this court; and the clerk of the court so affirmed that it was ruled in this court." Anon., Palm. 160. — Ed.

ATKINSON v. SETTREE.

IN THE COMMON PLEAS, MAY 7, 1744.

[Reported in *Willes*, 482.]

THIS was a special action on the case. The first count stated that on the 11th of December, in the 16th year, &c., at Westminster, and within the jurisdiction of the court of our Lord the King of his palace of Westminster, the plaintiff, in order to procure the payment of the sum 7*l.* 18*s.*, which Catharine Grimaldi then owed him, by a certain writ dated the 10th of December in the same year, duly issued out of the Court of Record of our said Lord the King of his palace of Westminster, at the plaintiff's request, and directed to the bearers of the verge of the household, &c., officers and ministers of the said court, commanding them to take the said Catharine by her body, if she should be found within the jurisdiction of that court, and have her at the then next court, to be holden on Friday the 17th of December then next, to answer, &c., procured the said Catharine to be arrested, &c., and to be there kept and detained in prison, &c.; that afterwards on the said 11th of December, in consideration that the plaintiff at request of the defendant undertook to release and discharge the said Catharine from her said imprisonment, the defendant promised to pay the plaintiff 7*l.* 18*s.*, and also the costs and charges by the plaintiff expended in that suit; with an averment that those costs amounted to 15*s.* 4*d.*, and that the plaintiff at the defendant's request discharged the said Catharine from her said imprisonment. There was a second count in the declaration, which, though it varied from the first in several particulars, was equally open to the objection afterwards made to the first. There was also a third count for money had and received.

The defendant pleaded the general issue, and at the trial the plaintiff obtained a verdict on all the counts, with 8*l.* 13*s.* 4*d.* damages.

A motion was made in Michaelmas Term, 1743, in arrest of judgment, which was opposed this day by *Prime*, King's Serjt., and *Wynne*, Serjt., and supported by *Skinner*, King's Serjt., and *Draper*, Serjt., and at a subsequent time

*The rule was discharged.*¹

¹ The grounds of the judgment do not appear in Lord Chief Justice Willes's books; but the following account is taken from Mr. J. Abney's MS.: "*Skinner* and *Draper*, Serjeants, moved in arrest of judgment. First, it does not appear that any plaint was levied, and without that a *capias* ought not to issue. Secondly, it does not appear that the cause of action in the court below arose within the jurisdiction, and then the arrest was illegal, and there was no good consideration to support the promise. 1 Rol. Abr. 809; 2 Mod. 30, 197; 3 Lev. 23; 1 Saund. 74; 2 Ld. Raym. 1310. This is a void arrest, and therefore the discharge is no consideration. Godb. 358.

"*Prime* and *Wynne*, Serjts., for the plaintiffs, insisted that to support this action

WILLIAMSON v. CLEMENTS.

IN THE COMMON PLEAS, APRIL 25, 1809.

[Reported in 1 Taunton, 523.]

THE plaintiff declared that the defendant was indebted to him in 39*l.* 15*s.* 2*d.*, by virtue of a bill of exchange drawn by the defendant, payable to his own order, and indorsed to the plaintiff, but which bill the plaintiff was then unable to produce, or deliver up to the defendant; and thereupon, in consideration of the premises, and that the plaintiff at the defendant's request had executed to him a bond conditioned for indemnifying the defendant against his afterwards being compelled to pay the said sum of money, and purporting to acknowledge its having been paid by the defendant to the plaintiff (although the same had not been actually so paid), the defendant undertook to pay the plaintiff the said sum of money upon request. After verdict for the plaintiff upon this count, Best, Serjt., had obtained a rule *nisi* for arresting the judgment, on the ground that no consideration was stated for the defendant's promise.

Shepherd, Serjt., now showed cause. The plaintiff has by this bond given the defendant a complete acquittance and discharge for his bill; for he has not only estopped himself from ever bringing any action upon the bill which was lost, so that the bill as between them is gone, and he could recover the sum due only upon the defendant's promise,

in the superior court it was immaterial whether or not there were a cause of action in the inferior court, or whether or not the court below had a jurisdiction. The declaration sets out the writ duly issued, commanding the bearer of the virge to arrest the party if found within the jurisdiction, and there to detain her. Salk. 201, 2. And the case of *Peacock v. Roll*, in 1 Saund. 74, relates only to cases determined in the inferior court and brought up by error. The case of *Randal v. Harvey* is better reported in Palm. 394, than in Godb. 358. If the plaintiff's consent were necessary to release Grimaldi, and the officer could not discharge her without, then there is a good consideration to support the promise. They argued that it was not necessary that the arrest and detainer should be legal in order to make a good consideration; and for that purpose they cited 1 Rol. Abr. 12, pl. 12; 1 Rol. Abr. 19, pl. 6; Hob. 216; Sir T. Raym. 204; 1 Rol. Abr. 27, pl. 47; Sty. 459. Besides, this is after a verdict, it having been proved to the satisfaction of Mr. J. Abney, who tried the cause, that the arrest and promise were within the jurisdiction of the Palace Court. 1 Sid. 30. If a judgment be irregular or erroneous, to forbear to sue out execution is a good consideration to support an assumpsit. 2 Rol. Rep. 495; Yelv. 25; 1 Vent. 120; 2 Lev. 3; 1 Lev. 257; 1 Sid. 392; Sir T. Raym. 211; Poph. 183; 1 Sid. 89; 1 Saund. 229; and 2 Ld. Raym. 795.

"THE COURT inclined to think that if the party were under an illegal arrest or imprisonment the promise was not good; but the question was whether, as this was after a verdict, it did not now sufficiently appear that the writ duly issued below, and consequently that the suit arose within the jurisdiction; and that this case greatly differed from writs of error on judgments in the inferior court where nothing shall be intended. But they ordered it to be spoken to again; and afterwards the plaintiff had judgment." — MS., Abney, J.

but also, if a third person had recovered against the defendant on the bill, the plaintiff on this bond would be bound to repay him. It is a detriment to the plaintiff to relinquish his remedy on the bill, and the subjecting himself to a detriment at the defendant's request is a sufficient consideration: it is not necessary that any benefit should result to the defendant. By the statute 9 and 10 W. III., c. 17, § 3, upon the loss of this bill the defendant was bound to give the plaintiff another of the same tenor, taking an indemnity against the former; and the plaintiff in fact accepts this promise in lieu of another bill, though he has not so stated it in his count. In 1 Rol. Abr. 22, pl. 21, it was held that the giving up the possession of bills of exchange was a good consideration, though they were given up at the request of one who was a stranger to the bills, and could never avail himself of them, because it was a detriment to the plaintiff to part with them. So, in an anonymous case, 1 Sid. 31, a son promised J. S., in consideration that he would deliver up the bond of his deceased father, and make him, the son, a discharge of the debt, he would pay him 100*l.*; and it was objected that it did not appear that the son was liable to this debt; but it was answered, that it should be intended that the discharge was made to the party entitled to it, and so a good consideration; but at all events it was a detriment to the plaintiff to deliver up the bond.

Best, contra. The plaintiff has all the advantage in this transaction, and the defendant none. It is sufficient for the defendant that it does not appear in this count that he was ever liable to pay this bill. By law a drawer is discharged if he has not notice of the dishonor of a bill, and no notice is here averred. It does not appear on this count but that the plaintiff might have negotiated the bill. The defendant could in no case have been liable for more than the amount of the bill: to that extent he is still liable; therefore he is not benefited. In the case cited the bills were delivered at the defendant's request; the nature of this transaction proves that the contract was entered into at the instance of the plaintiff, for it is in no respect either beneficial to the defendant, or prejudicial to the plaintiff, for whose convenience only it took place.

MANSFIELD, C. J. The count states that before and at the time of the promises the defendant was indebted to the plaintiff: that fact, therefore, must have been proved at the trial; but if he had been discharged for want of notice of the bill's dishonor, or if the plaintiff had negotiated the bill, the defendant could not have been found then indebted to the plaintiff: it therefore must be taken that he was bound in law to pay the bill. The count then states that in consideration that the plaintiff, being unable to deliver up the bill, had given a bond of indemnity and discharge, the defendant promised to pay. What then is it more or less than this: The defendant was indebted to the plaintiff on a bill of exchange, which was not then negotiated; the time of payment was arrived, for the money is stated to be then due. The bill could not afterwards pass into other hands with better rights than

the plaintiff had: it must pass subject to all the equities which the defendant had on it. The agreement is, entirely to discharge the defendant from payment of the bill, on his engaging in a different way to pay the money therein mentioned. Is not this a sufficient consideration?

HEATH, J., concurred.

LAWRENCE, J. The argument goes on a supposition which the count does not warrant, — that all is done at the instance of the plaintiff: now the count states that the request comes from the defendant. I will give the defendant credit to suppose him an honest man, and that, being told the bill is lost, he had said, “Give me a bond of indemnity, and I will give you another bill.” This is just as natural as if the plaintiff had found him unwilling to do this, and had requested it. It is a disadvantage to the plaintiff to execute the bond, if it is no advantage to the defendant. There is a case in 1 Sid. 57, *Traver v. —*, where a woman, after the decease of her husband, promised a creditor that, if he would prove her husband had owed him 20*l.*, she would pay it; and it was held a good consideration, because it was trouble and charge to the creditor to prove his debt.

CHAMBRE, J., concurring,

The rule was discharged.

BAILY v. CROFT.

IN THE COMMON PLEAS, NOVEMBER 10, 1812.

[*Reported in 4 Taunton, 611.*]

THE plaintiff having been partner in trade with Bennet, and having dissolved partnership, upon a statement of accounts between the parties, they agreed on a considerable balance as due from the plaintiff to Bennet, in part payment of which the plaintiff gave Bennet his acceptance of a bill for 1349*l.* 16*s.* 1*d.* Bennet had indorsed this bill, and delivered it to the defendant, who advanced to him thereon 500*l.*, and it was agreed between them that 300*l.* more should be raised on the bill for the use of the defendant, to whom Bennet was indebted in a greater amount than the whole contents of the bill. The plaintiff and Bennet afterwards, discovering that the real balance of accounts between them had not been correctly ascertained, were desirous to refer the accounts to arbitration; and in order to remove the obstacle which would arise from the bill which had been already given, and had been put into circulation, they agreed that that bill should be given up, and that a bill of the like date, and with the like securities, for such other sum of money as the arbitrators should award to be the balance due, should be accepted by the plaintiff and delivered to Bennet; and upon their application to the defendant to accede to this agreement, he agreed to

deliver up the bill of 1349*l.* 16*s.* 1*d.*, and to accept a like bill for the amount to be awarded; whereupon the plaintiff and Bennet submitted their accounts to arbitration. The arbitrators awarded that the former supposed balance, secured by the plaintiff to Bennet, was too much by 318*l.* 1*s.* The bill not being given up to the plaintiff, he declared upon this transaction, and stated that, in consideration of the mutual agreement, and in consideration that the plaintiff had undertaken to accept a bill for the sum to be awarded in exchange for the first bill, Bennet and defendant undertook to give up the first bill; and averred a request and refusal by the defendant. Upon the trial of this cause before Mansfield, C. J., at the sittings at Guildhall after Trinity Term, 1812, a verdict was found for the plaintiff.

Shepherd, Serjt., now moved to set aside the verdict and enter a nonsuit, upon the ground, which he had also urged at the trial, that there was no consideration moving from the plaintiff for the promise of the defendant.

MANSFIELD, C. J. The plaintiff agrees to give a new bill, which will impose a liability on him, and that is a consideration beneficial to the defendant.

HEATH and CHAMBERE, JJ., concurred in refusing the application.

GIBBS, J. Suppose the agreement had stood merely between the plaintiff and Bennet: no doubt there would have been sufficient consideration as between them. The defendant is included in the treaty, because he is the holder of the bill; he is taken in on Bennet's account, and in consideration of what the plaintiff agrees to do beneficial to Bennet, the defendant, on Bennet's account, agrees to do this. The plaintiff certainly would never have entered into this agreement to refer and give a new bill for the balance found, unless the defendant had come into the measure, and agreed to give up this bill; the plaintiff would never have left this bill outstanding in the hands of the defendant, exposing himself to have the amount of both bills recovered against him. In giving the second bill, the plaintiff gives that which is beneficial to Bennet; and the giving up the former bill is part of the equivalent paid for the doing that which is beneficial to Bennet; it appears to me, therefore, that there is a sufficient consideration for the promise.

Rule refused.

BROOKS v. BALL.

SUPREME COURT OF NEW YORK, OCTOBER TERM, 1820.

[*Reported in 18 Johnson, 337.*]

IN error to the Court of Common Pleas of Orange County. Ball brought an action of assumpsit against Brooks in the court below.

The declaration contained a special count, stating that the plaintiff claimed of the defendant the sum of one hundred dollars, which the defendant denied that he owed to the plaintiff, but promised that, if the plaintiff would make oath to the correctness of his claim, he, the defendant, would pay the amount thereof; and averred that the plaintiff did make oath to the truth and correctness of his claim, but that the defendant, notwithstanding his promise, refused to pay the one hundred dollars, &c. The declaration also contained the common money counts. The defendant pleaded the general issue.

After the plaintiff's counsel had stated his case, the defendant's counsel insisted that, admitting the facts stated to be proved, they were not sufficient to support the action, because the promise of the defendant was without consideration and void, and the plaintiff could not lawfully support his claim on his own affidavit. He therefore moved that the plaintiff should be nonsuited, but the objection was overruled by the court. The plaintiff then went into the evidence in support of his case. It was proved that the defendant made the promise alleged; that the plaintiff had made the affidavit, and demanded payment of the one hundred dollars; and that the defendant had admitted his liability to pay the money, and intended to pay, but was advised to the contrary.

The defendant's counsel then offered to prove that the plaintiff, in his affidavit, had sworn falsely, or was grossly mistaken. This evidence was objected to, and overruled by the court; and the counsel for the defendant tendered a bill of exceptions. The jury, under the direction of the court, found a verdict for the plaintiff for one hundred and ten dollars and fifty cents.

Wisner, for the plaintiff in error. This case is distinguishable from the cases which are to be found in the books. They will be found to be cases where the defendant promised to pay a precedent debt, if the plaintiff would prove it by a third person. Here the debt was to be created by the promise to pay on the oath of the plaintiff himself. It is against the fundamental principle of law, that a party should be a judge in his own cause, or give evidence in his own favor.

If such a promise can be a foundation for an action, it is at most *prima facie* evidence, and may be rebutted by showing that the plaintiff swore falsely, or was mistaken. 2 Comyn on Contracts, 449, 450.

Betts, contra. In *Knight v. Rushwood*, Cro. Eliz. 469, the defendant promised that, if the plaintiff and two witnesses would depose before the Mayor of Lincoln, as to a bond of a third person, the defendant would pay it. *Bretton v. Prettiman*, T. Raym. 153, is precisely in point to show that this action may be maintained. The defendant promised that, in consideration that the plaintiff would take an oath that money was due to him, he would pay it; and the plaintiff took an oath before a master in chancery, and brought assumpsit for the money, and recovered. S. C. 1 Sid. 283; 2 Keble, 44. In *Stevens v. Thacker*, Peake's N. P. Cases, 187, 188, the holder of a bill

of exchange promised not to sue the acceptor, if he would make affidavit that the acceptance was a forgery. The affidavit was drawn, but the defendant did not swear to it. Lord Kenyon said that, if the defendant had sworn to the affidavit, he should have held that he had discharged himself from the action, though the affidavit had been false. 1 Mod. 166; *Lloyd v. Willan*, 1 Esp. N. P. Cases, 178, 179; *Delesline v. Greenland*, 1 Bay's S. C. Rep. 458, s. p. One promise is a sufficient consideration for another promise. 8 Johns. Rep. 306.

SPENCER, C. J., delivered the opinion of the court. The principal question presented by this case is, whether a promise to pay a sum claimed to be due by one party and denied by the other, if the party claiming would swear to the correctness of the claim, and he does so swear, is a valid promise. Another question was made on the trial, whether it was competent to the defendant below to prove that the plaintiff below either swore falsely or was grossly mistaken in the affidavit which he made.

It has been frequently decided that a promise to pay money, in consideration that the plaintiff would take an oath that it was due, was a valid and binding promise. Thus, in *Bretton v. Prettiman*, Sir T. Raym. 153, the plaintiff declared that the defendant promised, in consideration that the plaintiff would take an oath that money was due to him, he would pay him; and the plaintiff averred that he swore before a master in chancery. On demurrer, it was adjudged for the plaintiff, and, as the reporter states, because it was not such an oath for which he may be indicted. In *Amie & Andrews*, 1 Mod. 166, there was a promise to pay, if the plaintiff would bring two witnesses before a justice of the peace, who should depose that the defendant's father was indebted to the plaintiff; and two judges against one thought it not a profane oath, because it tended to the determining a controversy, and the plaintiff had judgment. This case occurred before the Statute of Frauds. The promise would now be holden to be void, unless in writing, it being to pay the debt of a third person. The case of *Bretton v. Prettiman* is differently stated in 1 Sid. 283, and 2 Keb. 26, 44. It is there stated to be a promise to pay, if the plaintiff would procure a third person to make oath that the money was due. But this makes no difference in principle, for in either case the oath was extra-judicial.

In *Stevens and others v. Thacker*, Peake's N. P. Rep. 187, the defendant was sued as the acceptor of a bill, and alleged it to be a forgery, and offered to make affidavit that he never had accepted it. The plaintiff agreed not to sue the defendant, if he would make the affidavit. The affidavit was drawn, but not sworn to. Lord Kenyon said that, had the defendant sworn to the affidavit, he should have held that he had discharged himself, though the affidavit had been false; for the plaintiffs, who had agreed to accept that affidavit as evidence of the fact, should not, after having induced the defendant to commit the crime of perjury, maintain an action on the bill. In *Lloyd & Wil-*

lan, 1 Esp. Rep. 178, the defendant's attorney proposed to the plaintiff's attorney, that the defendant should pay the demand, if the plaintiff's porter would make an affidavit that he had delivered the goods in question to the defendant. The affidavit was made; and Lord Kenyon held it to be conclusive, and that the defendant was precluded from going into any defence in the case.

These cases, which stand uncontradicted, abundantly show that such a promise as the present is good in point of law, and that the making the proof or affidavit, whether by a third person or by the party himself, is a sufficient consideration for the promise. It is not making a man a judge in his own cause, but it is referring a disputed fact to the conscience of the party. It is begging the question to suppose that it will lead to perjury. If the promise is binding, because the making the proof or affidavit is a consideration for it, the defendant must necessarily be precluded from gainsaying the fact. He voluntarily waives all other proof; and to allow him to draw in question the verity or correctness of the proof or affidavit, would be allowing him to alter the conditions of his engagement, and virtually to rescind his promise

*Judgment affirmed.*¹

WILKINSON v. BYERS.

IN THE KING'S BENCH, APRIL 24, 1834.

[*Reported in 1 Adolphus & Ellis, 106.*]

ASSUMPSIT. The declaration stated that an action had been commenced and prosecuted in the Palace Court by Thomas Rimmer, as the defendant's attorney, in the name of the defendant, against the plaintiff, for the recovery of a certain sum, to wit, 13*l.* 10*s.*, alleged to be due from the plaintiff to defendant; which action was depending, and costs had been incurred therein: and thereupon, in consideration that plaintiff would pay defendant the said sum of 13*l.* 10*s.*, defendant promised plaintiff to settle with the said attorney for the costs of the action, and to indemnify plaintiff and bear him harmless from the same. Averment, that plaintiff confiding, &c., paid defendant the said sum, which he accepted; but that defendant did not settle with the attorney, &c.; by means and in consequence whereof the attorney proceeded with the action, and judgment was signed against plaintiff, and he was obliged to pay 7*l.* 16*s.* for costs of the action, and 3*l.* for costs of endeavoring to set the judgment aside; of which defendant, on, &c., had notice, but that he did not nor would indemnify plaintiff, &c. Plea, the general issue. At the trial before Patteson, J., at the sittings in Middlesex after Trinity Term, 1833, it appeared that the plaintiff

¹ See 1 Vin. Abr. 298, pl. 22. — Ed.

had employed the defendant (who carried on business as a wood-turner) to do work for him; that Rimmer, as the defendant's attorney, served the now plaintiff with a writ at the suit of the present defendant; and that a conversation afterwards passed between the parties at the plaintiff's house, which the son of the latter stated in evidence as follows: "My father expressed his surprise that he should have been treated in that peremptory manner. Byers said he had given no orders that he should be treated in that way; that he had desired the attorney to write a letter demanding payment of the balance due, and that was all the instructions he had given: he was extremely sorry such conduct had been pursued by his attorney, he having worked for my father many years, and having no just cause of complaint. My father offered to pay him the amount of the balance of the debt, and, taking into consideration the unjustifiable nature of the proceedings, would not he himself settle with his attorney? to which Byers readily assented, for the reason that he, Byers, himself would not pay any thing, he not having given instructions. The money was paid, and a receipt signed by Byers. Subsequently Byers said he would go immediately to Rimmer and settle the question of costs." Another witness, deposing to the same conversation, stated the defendant to have said that, if the plaintiff would pay him the money, as he was in particular want of it that day, he would settle the lawyer's expenses, and the plaintiff should come to no trouble about it. The receipt given by the defendant was as follows: "Received, March 30th, 1832, of Mr. Wilkinson, the sum of 13*l.* 10*s.*, balance of account to this day. John Byers." The costs at this time amounted to 1*l.* 4*s.* The defendant refused to pay them to the attorney, alleging that he had not authorized him to issue the writ, upon which the further proceedings ensued, which were stated in the declaration. Upon these facts a verdict was found for the now plaintiff, with 10*l.* 18*s.* damages; but leave was given to move to enter a nonsuit, on the ground that the payment being merely the discharge of an admitted debt, was no consideration for a promise by the creditor to the debtor. A rule *nisi* was afterwards obtained for entering a nonsuit, or for reducing the damages to 1*l.* 4*s.*

Sir *James Scarlett* and *Platt* now showed cause. The objection, if any, is on the record. Assuming that the declaration was sustainable, of which no question is made, the evidence was sufficient. As to the particular objection taken, the evidence here showed a contract, good in all its parts, and consistent with recognized practice. It constantly happens that a verdict is entered by consent, in consideration that no costs shall be taxed; and if a party attempted afterwards to tax costs, the court would stay the proceedings. That cannot be bad as a contract between parties, which the court is in the daily habit of enforcing. Supposing the whole demand to be really due, the plaintiff avoids delay and risk, and the loss of extra costs, by a compromise of this nature. It is therefore a good consideration; and if there be any, it is sufficient: the court will not look into the adequacy of it. If the

creditor agreed to allow a discount for immediate payment, such a consideration for the allowance would be good; and this is the same in principle. If a creditor, after action brought, were to say to the debtor, "Pay me now, and I will take no costs," the contract would be one which the debtor might enforce. It is true it could not be effectual without the sanction of the attorney; but that makes no difference in the case, considered as between the parties.

Kelly, contra. The question is not on the record. The consideration there stated is the payment of a debt alleged to be due; but it is clear, upon the evidence, that the debt was undisputed. Giving up a defence against a disputable claim may be a good consideration for a promise; but payment of an admitted debt is none. In the former case, undoubtedly, the court would not suffer its process to be used against good faith, nor would it inquire minutely into the adequacy of the consideration; but in the latter no such consideration can arise; and to say that it can be raised by any probable difficulty or delay in the prosecution of the claim, is a fallacy. If it be clear that the party is legally bound to pay, the question whether payment can be extorted from him in a shorter or longer time cannot affect the sufficiency of the payment as a consideration. In *Selw. N. P. tit. Assumpsit, § 1*, it is laid down that "the mere performance of an act which the party was by law bound to perform is not a sufficient consideration. Hence a promise made by the master, when a ship was in distress, to pay an extra sum to a mariner as an inducement to extraordinary exertion on his part, has been holden to be void; because a seaman is bound to exert himself to the utmost in the service of the ship;" to which point *Harris v. Watson*¹ is cited. [PARKE, J. How does it appear that the demand here was not upon a *quantum meruit*? In that case, payment of less than the sum claimed would be a consideration for a promise by the plaintiff.] The declaration states that the defendant had sued the plaintiff for a certain sum, to wit, 13*l.* 10*s.*; and in consideration that the plaintiff would pay the defendant the said sum of 13*l.* 10*s.*, he promised, &c.: and the evidence shows that a specific sum, the balance of account between the parties, and no other, was in question. [LITLEDALE, J. In *Reynolds v. Pinhowe* the declaration stated that, whereas the defendant had recovered 5*l.* against the plaintiff, the defendant, in consideration of 4*l.* given him by the plaintiff, undertook to acknowledge satisfaction of the judgment before such a day; and it was demurred to, on the ground that there was no consideration. But the court held otherwise; "for it is a benefit unto him to have it without suit or charge, and it may be there was error in the record, so as the party might have avoided it."] If in this case there was room for doubt, whether error might not have been brought on the record, the reasoning in the case cited was applicable; and so if, in an earlier stage of the cause, a doubt had existed whether or not the

¹ Peake, N. P. C. 72.

debt was due. But here no doubt existed: the debt was due or it was not, and the plaintiff admitted it; then in paying it he only discharged a duty. [PARKE, J. It is not clearly made out that there was a specific demand of 13*l.* 10*s.* previous to the agreement. The plaintiff admitted a liability to pay what the defendant claimed as his balance; but that admission is to be coupled with the fact that the defendant at the same time agreed to pay his own costs; and it does not appear from the whole, that the sum of 13*l.* 10*s.* was a sum originally demanded by the defendant, or due from the plaintiff.] The case leaves no room for conjecture as to this. The sum of 13*l.* 10*s.* stated in the declaration is the sum paid by the plaintiff as due on his part, and admitted by the defendant in conversation and by his receipt to be the balance claimable by him. [Parke, J. It might have been paid on a *quantum meruit*. In the absence of evidence, are we to assume that there was a demand certain? To support your case, there should have been a demand about which there was no dispute, and for a specified sum.] If there was a doubt upon this, it should have gone to the jury. But if the demand was uncertain at first, it became certain when the parties had agreed to fix it at 13*l.* 10*s.* [PARKE, J. That agreement was on a condition. PATTESON, J. The defendant's undertaking as to the costs forms part of the same transaction.] The "sum" or "balance due," and 13*l.* 10*s.*, appear as convertible terms throughout the proceeding; and there is no proof that the parties ever had any discussion on the subject.

LITTLEDALE, J. I should prefer taking the case as it has just been put by Mr. Kelley; viz., that the sum of 13*l.* 10*s.* was originally due from the plaintiff, and was not fixed by arrangement at the time of the bargain in question. And, viewing it so, I still think the plaintiff is entitled to recover. *Reynolds v. Pinhowe* is a direct authority on this point. There is indeed another case, *Dixon v. Adams*, in the same volume of reports, which may appear contradictory. But the promise there was of a very different nature from that in the preceding case and in this. There the obligee of a bond had judgment on *scire facias* against the bail, "and he, without other process, paid the condemnation money; and Adams (the obligee), in *consideratione inde*, assumed to Dixon (the bail) to deliver unto him the principal obligation, and a letter of attorney to sue it against J. D." (the obligor); and it was held not a sufficient consideration, "for Dixon had not done any act whereto the law would not have compelled him." And if the promise, as in that case, be to do a collateral thing, the consideration may be insufficient. But here the debtor says, "You have sued me for a debt, and may have trouble in recovering it; if you will forego the costs" (for the stipulation as to paying the attorney amounts merely to that), "I will pay the debt now." If the creditor agreed to these terms, he could not afterwards enforce payment of the costs. To do so, he must have proceeded to final judgment; but it would have been against his duty and against law to take that course. We are not

now taking into consideration the rights of the attorney, in respect of his lien for costs; but, looking at the case as between the parties, if, after such an undertaking, the plaintiff attempted to go on with the action, it would be a breach of faith, and a contempt, and the court would stay the proceedings. A promise which the court would enforce by restraining the plaintiff from proceeding contrary to the terms entered into, cannot be treated here as a promise made on insufficient consideration, and is quite unlike an undertaking to do something merely collateral, as in the case of *Dixon v. Adams*. I therefore think the rule must be discharged.

PARKE, J. I am of the same opinion. It is not necessary to consider the case on the ground upon which it has been put by my brother Littledale, though as to that I do not mean to say that I differ in opinion. But the case may be decided shortly on this ground: If an action be brought on a *quantum meruit*, and the defendant agree to pay a less sum than the demand in full, that is a good consideration for a promise by the plaintiff to pay his own costs, and proceed no further. Payment of a less sum than the demand has been held to be no satisfaction in the case of a liquidated debt; but where the debt is unliquidated, it is sufficient. Now here we cannot say that there was originally any certain demand. A jury, if asked, could not in my opinion have said so. In the great majority of actions of this nature, for work, labor, and goods sold, it is not a specific sum that forms the subject-matter of the action; and unless that could have been shown in the present case, there was a good consideration for the promise.

PATESON, J. I am of the same opinion. If a question had been raised upon the record, the words "a certain *alleged* debt" would have been a complete answer to the defendant's objection; and, indeed, this seems almost admitted. It is consistent with the declaration that there may have been a dispute between the parties as to the sum actually due. The answer attempted is, that the evidence showed the contrary. But, looking to the whole evidence, I think that is not so. The expressions of the plaintiff's son do not support that view of the case; and it appears that the defendant admitted having instructed his attorney to write a letter, which is not usually done where the party is considered able to pay, unless there be some dispute as to the sum. I do not say that I differ from my brother Littledale in his view of the case, supposing that there had been an admitted demand, though on that point I am not quite sure; but it is unnecessary to go that length, because it is not clear, in my opinion, that there was a settled and admitted demand. There is no ground for the reduction of damages: the defendant, to fulfil his promise to the plaintiff, might have paid the £1 4s. to the attorney, and afterwards disputed the matter with him. Whether the Palace Court were right or not in refusing to set aside the judgment, it was by the defendant's own act that costs exceeding £1 4s. were incurred.

*Rule discharged.*¹

¹ See *Sibree v. Tripp*, 15 M. & W. 23, 36, per Parke, B.

WILKINSON v. OLIVEIRA.

IN THE COMMON PLEAS, JANUARY 27, 1835.

[Reported in 1 *Bingham's New Cases*, 490.]

THE declaration stated that divers disputes and controversies had arisen between the defendant and divers other persons respecting the disposition of the estate and effects of one Dominick Oliveira, then late deceased, and the right of the defendant to the possession of any and what part thereof; in which disputes and controversies it became and was necessary, for the termination thereof in favor of the defendant, that the defendant should prove that the said Dominick Oliveira was, at the time he made his will, and at the time of his death, an alien, and a native of Portugal; that the plaintiff was lawfully possessed of a certain writing and paper, being a letter written by the said Dominick Oliveira in his lifetime to the plaintiff, which said letter showed, declared, and proved, that the said Dominick Oliveira was, at the time he made his will, and at the time of his death, an alien and a native of Portugal; that the plaintiff, at the request of the defendant, gave to the defendant the said letter, to be used and employed by the defendant for the purpose of proving that the said Dominick Oliveira was such alien and native of Portugal at the time he made his will and at the time of his death; that the defendant used and employed the said letter for the said purpose; and that by means of the said letter and of the matters therein contained, the defendant was enabled to and did cause the said disputes and controversies to be determined in favor of him, the defendant; and did, by means of the said letter and of the matters therein contained, become lawfully possessed of and acquired a large portion of the estate and effects of the said Dominick Oliveira, of great value, to wit, of the value of 100,000*l.* &c. And thereupon, to wit, on, &c., at, &c., in consideration thereof, and that the plaintiff, at the special instance and request of the defendant, had then and there given the said letter to the defendant, the defendant then and there undertook and faithfully promised the plaintiff to give him, the plaintiff, a certain sum of money, to wit, the sum of 1000*l.*

Breach: refusal to give the 1000*l.* in conformity with the promise.

Plea: that the defendant was not, by means of the letter, enabled to, and did not by means thereof, cause the said disputes to be determined in favor of the defendant; and that the defendant did not, by means of the letter, become possessed of a portion of the estate of Dominick Oliveira, of the value of 100,000*l.*

Demurrer: for putting in issue matter not properly issuable, and for not denying or confessing and avoiding the breach of promise. Joinder.

Kelly, for the plaintiff, was called upon by the court to support the

declaration. The consideration, though past, is alleged to have arisen at the defendant's request, which renders it sufficient to impart validity to the defendant's promise; and though the letter in question is alleged to have been given to the defendant, the statement amounts to this: that in consideration the plaintiff had put the defendant in possession of a document by which the defendant was enabled to recover 100,000*l.*, the defendant undertook to give the plaintiff in return 1000*l.* For such an undertaking the delivery of the document was ample consideration.

Tulfourd, Serjt., contra, contended that, taking the whole declaration together, it appeared plainly the letter had been handed to the defendant by way of a spontaneous gift; and such gift was no consideration for a promise to pay.

TINDAL, C. J. What would you say to the case of a man who, entering a shop, should say, "I'll give you 10*l.* for such an article?" Here the word "give" is used on both sides. It is a gift upon a mutual consideration.

PER CURIAM. There must be

Judgment for the plaintiff.

BAINBRIDGE v. FIRMSTONE.

IN THE QUEEN'S BENCH, NOVEMBER 2, 1838.

[*Reported in 8 Adolphus & Ellis, 743.*]

ASSUMPSIT. The declaration stated that, whereas heretofore, to wit, &c., in consideration that plaintiff, at the request of defendant, had then consented to allow defendant to weigh divers, to wit, two boilers of the plaintiff, of great value, &c., defendant promised that he would, within a reasonable time after the said weighing was effected, leave and give up the boilers in as perfect and complete a condition, and as fit for use by plaintiff, as the same were in at the time of the consent so given by plaintiff; and that although in pursuance of the consent so given, defendant, to wit, on, &c., did weigh the same boilers, yet defendant did not, nor would, within a reasonable time after the said weighing was effected, leave and give up the boilers in as perfect, &c., but wholly neglected and refused so to do, although a reasonable time for that purpose had elapsed before the commencement of this suit; and, on the contrary thereof, defendant afterwards, to wit, on, &c., took the said boilers to pieces, and did not put the same together again, but left the same in a detached and divided condition, and in many different pieces, whereby plaintiff hath been put to great trouble, &c. Plea: *non assumpsit*.

On the trial before Lord Denman, C. J., at the London Sittings after last Trinity Term, a verdict was found for the plaintiff.

John Bayley now moved in arrest of judgment. The declaration shows no consideration. There should have been either detriment to the plaintiff, or benefit to the defendant. 1 Selwyn's N. P.¹ 45. It does not appear that the defendant was to receive any remuneration. Besides, the word "weigh" is ambiguous.

LORD DENMAN, C. J. It seems to me that the declaration is well enough. The defendant had some reason for wishing to weigh the boilers; and he could do so only by obtaining permission from the plaintiff, which he did obtain by promising to return them in good condition. We need not inquire what benefit he expected to derive. The plaintiff might have given or refused leave.

PATESON, J. The consideration is, that the plaintiff, at the defendant's request, had consented to allow the defendant to weigh the boilers. I suppose the defendant thought he had some benefit; at any rate there is a detriment to the plaintiff from his parting with the possession for even so short a time.

WILLIAMS and COLERIDGE, JJ., concurred.

Rule refused.

HAIGH AND ANOTHER v. BROOKS.

IN THE QUEEN'S BENCH, JUNE 6, 1839.

[*Reported in 10 Adolphus & Ellis, 309.*]

BROOKS v. HAIGH AND ANOTHER.

IN THE EXCHEQUER CHAMBER, JUNE 29, 1840.

[*Reported in 10 Adolphus & Ellis, 323.*]

ASSUMPSIT. The first count of the declaration stated that heretofore, to wit, on &c., in consideration that the said plaintiffs, at the special instance and request of the said defendant, would give up to him a certain guaranty of 10,000*l.*, on behalf of Messrs. John Lees & Sons, Manchester, then held by the said plaintiffs, he the said defendant undertook, and then faithfully promised the said plaintiffs, to see certain bills, accepted by the said Messrs. John Lees & Sons, paid at maturity; that is to say, a certain bill of exchange, bearing date, &c., drawn by plaintiffs upon and accepted by the said Lees & Sons, payable three months after date, for 3466*l.* 13*s.* 7*d.*, and made payable at, &c.; and also a certain other bill, &c., describing two other bills for 3000*l.* and 3200*l.*, drawn by plaintiffs upon and accepted by Lees & Sons, and made payable at, &c. Averment: that plaintiffs, relying on defendant's said promise, did then, to wit, on, &c., give up to the said

defendant the said guaranty of 10,000*l.* Breach, non-payment of the bills, when they afterwards came to maturity, by Lees & Sons, or the parties at whose houses the bills respectively were made payable, or by defendant, or any other person, &c.

Third plea to the first count: "That the said supposed guaranty of 10,000*l.*, in consideration of the giving up whereof the defendant made such supposed promise and undertaking as therein mentioned, and which guaranty was so given up to the said defendant as therein mentioned, was a special promise to answer the said plaintiffs for the debt and default of other persons, to wit, the said Messrs. John Lees & Sons in the said first count mentioned; and that no agreement in respect of, or relating to, the said supposed guaranty or special promise, or any memorandum or note thereof, wherein any sufficient consideration for the said guaranty or special promise was stated or shown, was in writing and signed by the said defendant, or any other person by him thereunto lawfully authorized. And the said defendant further saith that the said supposed guaranty, in consideration of the giving up whereof the defendant made the said supposed promise and undertaking in the said first count mentioned, and which was so given up as therein mentioned, was and is contained in a certain memorandum in writing, signed by the defendant, and which was and is in the words and figures and to the effect following, that is to say:—

MANCHESTER, 4th February, 1837.

MESSRS. HAIGH & FRANCEYS.

GENT.,—In consideration of your being in advance to Messrs. John Lees & Sons in the sum of 10,000*l.* for the purchase of cotton, I do hereby give you my guaranty for that amount (say 10,000*l.*) on their behalf.

JOHN BROOKS.

And that there was no other agreement or memorandum or note thereof, in respect of, or relating to, the said last-mentioned supposed guaranty or special promise; wherefore the said defendant says that the supposed guaranty, in consideration whereof the said defendant made the said supposed promise and undertaking in the said first count mentioned, was and is void and of no effect; and, therefore, that the said supposed promise and undertaking in the said first count mentioned was and is void and of no effect." Verification.

Demurrer: assigning for cause, "that it is admitted by the plea that the memorandum, the giving up of which was the consideration of the guaranty in the said declaration mentioned, was actually given up to the said defendant by the said plaintiffs, and the consideration was, therefore, executed by the said plaintiffs; and that, even if the original memorandum was not binding in point of law, the giving up was a sufficient consideration for the promise in the declaration mentioned." Joinder. The demurrer was argued in last Hilary Term.

Sir *W. W. Follett* for the plaintiffs. The undertaking declared upon is, on the face of it, sufficient to satisfy the Statute of Frauds, 29 Car. 2,

c. 3, § 4. It is said, however, that the consideration is really insufficient, because the guaranty delivered up was one which could not have been sued upon consistently with the statute. But assuming that to be so, a promise in consideration of delivering up such a guaranty might still be good. The defendant might, for substantial reasons, wish to have the guaranty back. His mercantile character was pledged by it. It might, on various other accounts, be important to him that such a paper should not remain in the plaintiff's hands; and if the bargain was made upon any consideration, the Court will not inquire into its adequacy. This principle was lately recognized in *Hitchcock v. Coker*.¹ Such a promise might be made in consideration of delivering up a letter; no one but the defendant might be able to judge how far the possession of it was valuable; but if the letter was given up at his request, the rule would apply that any thing so given, to the plaintiff's detriment or the benefit of the defendant, is consideration for an assumpsit. Suppose the undertaking given up had been one rendered unavailing by the Statute of Limitations, no action would have lain upon it; but the attempt to enforce it could not perhaps have been resisted without injury to the defendant's mercantile character; the relinquishment of it therefore would have been good consideration for a promise. The present is a similar case. Release from a moral obligation is consideration enough for an express promise. If it were necessary that something should be foregone to which there was a legal right, the delivery of the mere written paper which contained the first guaranty was sufficient in this case. The plaintiffs are entitled to put some value on the possession of such a paper, though not legally available; as they might on the possession of a cancelled bond, or bills accepted by the defendant on wrong stamps. It is not, indeed, clear in this case that the first guaranty was void. In *Boehm v. Campbell*² a similar guaranty was held to show a sufficient consideration, though the advance for which the security was given had been already made, and it did not appear more distinctly than in the present case that time was to be granted. Supposing it even questionable whether the former undertaking bound the defendant, yet the discharge from a claim or waiver of a defence, on which the promisee might or might not have been legally entitled to succeed, is consideration enough to support an assumpsit. *Longridge v. Dorville*; *Stracy v. The Bank of England*.³ Here, however, it appears at all events that the original guaranty may have been given under circumstances which rendered it morally binding; and that brings it within the principle of *Lee v. Muggeridge*, and other cases in which promises supported by moral obligation have been held sufficient.

Sir J. Campbell, Attorney-General, *contra*. First, the original

¹ 6 A. & E. 438. And see *Archer v. Marsh*, 6 A. & E. 959.

² 3 B. Moore, 15; s. c. 8 Taunt. 679.

³ 6 Bing. 754.

guaranty was void; and, if so, then, secondly, the promise declared upon is without consideration.¹ . . . Secondly, the guaranty being void, the undertaking substituted for it, without any new consideration, is void also. The case is no better than if a second guaranty had been given in the words of the first. A consideration, to support a promise, must have some value in point of law; *Smith and Smith's Case*, and other authorities cited in note (b) to *Barber v. Fox*.² *Rann v. Hughes* illustrates the same point. A man may have in his possession a letter of which improper use might be made; but his delivering it up is no legal consideration. An unfounded action may create annoyance; but the renouncing it is no consideration in law for a promise. Where, indeed, there is a reasonable doubt, in point of law, whether the promisee would or would not succeed if the litigation were prosecuted, the case is different: that was so in *Longridge v. Dorville*, and *Stracy v. The Bank of England*. In *Shortrede v. Cheek*,³ the consideration disclosed was, that the plaintiff should withdraw a promissory note on which he had an unquestioned right of action; and Parke, J., said, "There is no doubt that the giving up of any note upon which the plaintiff might have sued would be a sufficient consideration." It is argued that foregoing a security upon which the Statute of Limitations had attached would be a consideration; but there an action would lie on the security if the statute were not pleaded. Whether the giving up a bill drawn on a wrong stamp would be a consideration or not may be questionable; but the objection is not one of which the Court would take judicial notice: here the Court must take notice that the guaranty is invalid. It is contended here that the promise is binding, because grounded on a moral obligation; but that obligation rests on a promise which is itself not binding: the new engagement then cannot have more force than the original one. In the cases where a moral obligation has been held sufficient ground for an express promise, the obligation has been something more than a *nudum pactum*: thus, in *Lee v. Muggeridge* money had been advanced by the plaintiff at the request of the promisor. But the doctrine that a moral obligation is sufficient consideration for a subsequent promise is not free from doubt. Lord Tenterden said, in *Littlefield v. Shee*, that it must be "received with some limitation." The instances which have been considered as establishing that doctrine are brought together in note (a) to *Wennall v. Adney*,⁴ and seem to resolve themselves into these classes: First, where there has been a legal obligation antecedent to the promise, — as the duty of overseers to provide for the poor; secondly, where there was an antecedent equitable liability, as that of an executor to pay legacies, — but the doctrine, as applicable to these cases, appears to have been overruled; thirdly, where a debt existed before the promise, but

¹ The argument upon the first question is omitted. — Ed.

² 2 Wms. Saund. 137 e, 5th edit. See *Jones v. Waite*, 5 New Ca. 341.

³ 1 A. & E. 57. See *Wilkinson v. Byers*, 1 A. & E. 106.

⁴ 3 Bos. & P. 249.

the remedy was barred by statute, — as in the cases of certificated bankrupts or discharged insolvents, or where the Statute of Limitations has attached: in these instances the party indebted may waive the statutory bar, and oblige himself by a promise to pay the debt; fourthly, where a promise merely voidable has been ratified, as in the case of a person of full age promising to pay a debt contracted during his infancy.¹ In all these cases, so far as the doctrine is established, there has been an actual benefit received, or a debt, or other ground of legal obligation, antecedent to the promise relied upon; not merely a *nudum pactum*, as in the present instance, where the party originally promising had received no benefit, nor had the plaintiffs incurred any loss or prejudice at his request. The money had been advanced when the guaranty was given: then the defendant says, “Forego the guaranty, and I will see you paid.” The prior moral obligation was only that which every man is under to keep his word. *Nash v. Brown*,² *Holliday v. Atkinson*,³ and *Bret v. J. S. and his wife* (cited in note (b) to *Barber v. Fox*), all show that moral considerations, where no actual benefit has been received by one party or prejudice sustained by the other, and no legal duty has attached, are not sufficient ground for an assumpsit. As to the delivery in this case of the mere paper, it is not pretended that the paper had any value: the contract of guaranty, not the paper containing it, was the object really in question.

Sir *W. W. Follett*, in reply. . . . If it was only doubtful whether such a guaranty was not available, the giving it up was a good consideration. If the invalidity of it was not a point as clear as that the eldest son inherits, the court will not measure the degree of doubt. It has scarcely been disputed that the giving up of bills drawn on wrong stamps, or a contract on which the Statute of Limitations had attached, would be sufficient consideration; but those cases do not essentially differ from the present. The bills are void from the first, and cannot be made valid, though the promisor may have good reason for wishing to get them into his possession. It is suggested that the bar created by the Statute of Limitations may be waived; but so also may that under the Statute of Frauds. It is clear that, to support a promise of this kind, there need not have been an original liability in the promisor; for that is not so in the case of the bills, or in that of the contract made during infancy. That a promise may be founded on sufficient consideration, though no benefit has accrued to the promisor, appears from *Stevens v. Lynch*,⁴ where the drawer of a bill, knowing that time had been given to the acceptor, undertook to pay on the acceptor’s default, and an action was held maintainable on that undertaking. But supposing the guaranty in this case to have been totally void, the giving up of a paper on which no action would lie may be sufficient consideration for a promise. Here the plaintiffs, though not

¹ See *Meyer v. Haworth*, 8 A. & E. 467.

² *Chitty on Bills*, 74, note (x), 9th edit. (1840), by *Chitty & Hulme*.

³ 5 B. & C. 501.

⁴ 12 East. 38.

entitled to recover on the guaranty, might have brought trover for the document, if unlawfully taken out of their hands. In considering whether or not such an action would lie, the value would be of no importance: it is enough for the present argument, if the plaintiffs could have recovered a shilling. Suppose the defendant had said, "If you will not bring trover, I will pay the bills;" an action would clearly have lain on such an agreement, and the case would not have differed from the present. The consideration here is, not the releasing of an action on the guaranty, but the giving it up; whatever its value may have been, the bargain is binding. [COLERIDGE, J. It is decided in *Scott v. Jones*¹ that trover lies for an unstamped document, *if* it is capable of being made good by stamping.] Any paper may be the subject of an action of trover. *Cur. adv. vult.*

LORD DENMAN, C. J., in this Term (June 6th) delivered the judgment of the court.

This action was brought upon an assumpsit to see certain acceptances paid, in consideration of the plaintiffs giving up a guaranty of 10,000*l.* due from the acceptor to the plaintiffs. Plea: that the guaranty was for the debt of another, and that there was no writing wherein the consideration appeared, signed by the defendant, and so the giving it up was no good consideration for the promise. Demurrer: stating for cause that the plea is bad, because the consideration was executed, whether the guaranty was binding in law or not. The form of the guaranty was set out in the plea: "In consideration of your being in advance to Messrs. John Lees and Sons, in the sum of 10,000*l.*, for the purchase of cotton, I do hereby give you my guaranty for that amount (say 10,000*l.*), on their behalf. John Brooks."

It was argued for the defendant that this guaranty is of no force, because the fact of the plaintiffs being already in advance to Lees could form no consideration for the defendant's promise to guarantee to the plaintiffs the payment of Lees's acceptances. In the first place, this is by no means clear. That "being in advance" must necessarily mean to assert that he was in advance at the time of giving the guaranty, is an assertion open to argument. It may possibly have been intended as prospective. If the phrase had been "in consideration of your *becoming* in advance," or "*on condition* of your being in advance," such would have been the clear import.² As it is, nobody can doubt that the defendant took a great interest in the affairs of Messrs. Lees, or believe that the plaintiffs had not come under the advance mentioned at the defendant's request. Here is then sufficient doubt to make it worth the defendant's while to possess himself of the guaranty; and, if that be so, we have no concern with the adequacy or inadequacy of the price paid or promised for it.

¹ 4 Taunt. 865.

² See the discussion on the words "for giving his vote," in Lord Huntingtower v Gardiner, 1 B. & C. 297.

But we are by no means prepared to say that any circumstances short of the imputation of fraud in fact could entitle us to hold that a party was not bound by a promise made upon *any consideration* which could be valuable; while of its being so, the promise by which it was obtained from the holder of it must always afford some proof.

Here, whether or not the guaranty could have been available within the doctrine of *Wain v. Warlters*,¹ the plaintiffs were induced by the defendant's promise to part with something which they might have kept, and the defendant obtained what he desired by means of that promise. Both being free and able to judge for themselves, how can the defendant be justified in breaking this promise, by discovering afterwards that the thing in consideration of which he gave it did not possess that value which he supposed to belong to it? It cannot be ascertained that that value was what he most regarded: he may have had other objects and motives, and of their weight he was the only judge. We therefore think the plea bad; and the demurrer must prevail.

Judgment for the plaintiffs.

The plaintiffs having signed judgment, error was brought in the Exchequer Chamber.

The writ of error set out the pleadings, of which the material part is stated in the preceding report. The errors assigned were, that the declaration is insufficient, and that the judgment was for the plaintiffs below, whereas it ought to have been for the defendant. The writ of error was argued in Trinity Vacation, June 22d, 1840, before LORD ABINGER, C. B., BOSANQUET, COLTMAN, and MAULE, JJ., and ALDERSON and ROLFE, BB.

Sir *J. Campbell*, Attorney-General, for the plaintiff in error. . . . No action would have lain on this guaranty; and if so, is the giving it up sufficient consideration for a new promise? Such an act is no consideration, unless the thing given up be of some merchantable value. Thus in *Com. Dig.*, Action upon the Case upon Assumpsit (F. 8), (cited by *Holroyd, J.*, in *Longridge v. Dorville*), it is said that the action does not lie upon a promise "in consideration of a surrender of a lease at will; for the lessor might determine it." There is indeed a qualification added: "unless there was a doubt whether it was a lease at will or for years;" but even then, unless the doubt were a very reasonable and well-grounded one, the action would fail. In *Smith and Smith's Case* the alleged consideration for an assumpsit was, that the promisee "would commit the education of his children, and the disposition of his goods after his death, during the minority of his said children, for the education of the said children," to the defendant; and this was held not sufficient, the consideration being only to have the disposition of the goods for the benefit of the children, and not for the defendant's profit. There must be some advantage to the promisor, or detriment incurred

¹ 5 East, 10.

by the promisee at his request. [MAULE, J. It need not be pecuniary. LORD ABINGER, C. B. In *Smith and Smith's Case* the suggestion in support of the consideration was, that the defendant was to reap a pecuniary advantage, which the Court would not presume, because his doing so would have been a breach of trust.] The advantage must be such as can be appreciated in a court of law. There are many cases in which promises, in consideration of forbearance to sue, have been held void where there was no suit that could have been forborne. *Tooley v. Windham*; ¹ *Barber v. Fox*; *Loyd v. Lee*. It is true that the giving up a doubtful point of law has been held a good consideration, as in *Longridge v. Dorville*; and it may be so where a reasonable doubt exists; but in this case there could be no doubt on the invalidity of the first guaranty. [ALDERSON, B. What is the ground on which the giving up a doubtful point of law is a consideration? To whom must it be doubtful? The court which decides upon the assumption must be supposed capable of deciding the point of law.] There is a degree of uncertainty which the courts will notice. [MAULE, J., referred to *Jones v. Randall*.²] In *Stracy v. the Bank of England*, the point which might have been litigated was one of great nicety and difficulty. Tindal, C. J., in his judgment, so describes it. The argument on moral obligation can apply only to the first guaranty; the terms of the declaration do not admit of its being extended to the second. And on the first guaranty no consideration appears, except the general obligation to perform a promise.

The Court below, in their judgment, argue that the words "in consideration of your being in advance" might mean "on condition of your being in advance," and suggest, as rendering this probable, that the plaintiffs must have come under the advance at the defendant's request, a supposition not confirmed by any thing which appears on the record; and they ground upon it the observation: "Here is then sufficient doubt to make it worth the defendant's while to possess himself of the guaranty; and if that be so, we have no concern with the adequacy or inadequacy of the price." They also say: "Whether or not the guaranty could have been available within the doctrine of *Wain v. Warlters*, the plaintiffs were induced by the defendant's promise to part with something which they might have kept, and the defendant obtained what he desired by means of that promise." [MAULE, J. The record does not show that any document was in the plaintiff's possession. "Giving up" the guaranty might be merely relinquishing the contract. ALDERSON, B. If they held a written guaranty, it might have been given up by cancelling merely.] The Court below argue that the defendant cannot be justified in breaking his promise by discovering that the thing in consideration of which he gave it did not possess that value which he supposed to belong to it. "It cannot be ascertained," they say, "that that value was what he

¹ Cro. Eliz. 206.

² 1 Cowp. 37.

most regarded. He may have had other objects and motives; and of their weight he was the only judge." But this reasoning would support a promise even in such a case as *Barber v. Fox*. The plaintiffs contend that trover would have lain for the paper; but it may be inferred, even from *Scott v. Jones*, that this would not be so unless the paper had some real value.

Sir *W. W. Follett*, contra. As to the observation that no actual delivery of a written paper appears, if that were considered important, the plaintiffs would ask leave to amend. The point was not taken on the former argument; and, when the declaration speaks of giving up a guaranty, which it describes as "then held" by the plaintiffs, it cannot reasonably be supposed that nothing is meant but foregoing an engagement. Supposing that no action would have lain on the first guaranty, here is an agreement between persons competent to make contracts, without imputation of fraud on either side, by which one is to give up an undertaking signed by the other, and the other in consideration of it is to provide for certain bills. It is assumed without reason that the defendant's only object in desiring to have the guaranty back must have been to prevent an action. He might not choose that his name should remain abroad in the mercantile world, annexed to such a document. It implies an admission which he might think proper to recall. He might not wish, if sued, to be put to a defence on the Statute of Frauds. If he attached a value to the document from any cause, however inadequate, as a man might be willing to give an immoderate price for a picture or autograph, the Court will not inquire into the goodness of the bargain. Giving up any thing of which they were possessed was a disadvantage to the plaintiffs; and the defendant here was benefited by it. The case therefore differs from that of a mere forbearance to sue, where nothing is given and received. The law of *Smith and Smith's Case* may be doubted. If the promisee there complied with terms by which the defendant obtained something from him, although those terms could not authorize the making of any illegal profit, it would seem that the defendant was bound. . . .

Supposing, however, that an action would not have lain on the first guaranty, yet, if the law upon the subject was doubtful (though *Boehm v. Campbell* makes it clear on the side of the plaintiffs), and the parties upon that doubt entered into a bargain for the abandonment of the guaranty, such bargain, made with a knowledge of all the facts, is binding. *Longridge v. Dorville*; *Stracy v. The Bank of England*; Com. Dig. Action upon the Case upon Assumpsit (F. 8), referring to 1 Rol. Abr. 23, *Action sur Case* (V.), pl. 27, 28.¹ It is indeed asked, Who is supposed to entertain the doubt in point of law? But matters of law may be considered as doubtful to the courts; and arrangements

¹ Comyns refers to *Kent v. Pratt*, Brownl. & Gold. 6, the case cited by Rolle. But it does not appear that any doubtful point of law was contemplated.

in equity are often made on the ground of the law being doubtful. [BOSANQUET, J. A point may be considered so, on which learned men differ. LORD ABINGER, C. B. It is carrying fiction too far to say that the courts must always know how the law will be.] The parties here have made their contract on a consideration which they, knowing all the facts, thought beneficial; and this is enough. Merchantable or pecuniary value, in any more limited sense, is not to be insisted upon. The case falls within the principle of *Stevens v. Lynch*, and also within that of *Lee v. Muggeridge*, and other decisions which have turned upon moral obligation. It results from all these authorities that if parties, having made an engagement which ought to bind them but is incapable of being enforced, replace it by another, that new engagement is valid in law. If the contrary doctrine could prevail, what limit would there be to objections? Would a second or third renewal of guaranties be void on account of the original defect?

Lastly, as was contended below, if the consideration amounts to no more than the delivering up of a paper at the defendant's request, the Court cannot say that it is insufficient. If they do, at what point will they allow sufficiency of consideration to begin? Would the giving up an autograph, or a horse or dog of no merchantable value, be sufficient? [LORD ABINGER, C. B. The Attorney-General cited the case of a lease at will.] That relates to a surrender, not the giving up of a document. Papers, though ineffectual for the purpose contemplated in drawing them up, may have a value from the mere wish of a party to get them into his own hands. [ROLFE, B. The Lord Chancellor has said that he will never compel the giving up of an instrument which is void on the face of it.] An application in equity for that purpose is very different from the enforcing of a bargain to give up something which is considered valuable. [BOSANQUET, J. Is not the document property, however small the value?] Yes; and trover would lie for it. In *Wilkinson v. Oliveira* it was held sufficient consideration, for a promise to pay 1000*l.*, that the plaintiff, being possessed of a certain letter, had given it to the defendant. It is true that the defendant was alleged to have made a beneficial use of the letter; but that was not an essential part of the consideration. Here the defendant could judge of the value of the document, and using his judgment made the promise. He cannot now annul it on the ground that the instrument was of no value.

Sir *J. Campbell*, Attorney-General, in reply. The last argument rests on a fallacious assumption. The bargain declared upon was not for the delivery of a piece of paper, but for the release of a contract. It does not appear that the paper itself may not even now be in the plaintiffs' possession. The plea, that the guaranty was of no effect, agrees with this view of the case. The main argument on the other side, assuming the first guaranty to be void, is in effect that, because it was given up at the defendant's request, he is estopped from saying that such an abandonment was no consideration for his promise. But

this is contrary to the principle of many *placita* in Com. Dig., Action upon the Case upon Assumpsit (F. 8), already cited. On those authorities, if the right foregone was in reality null, it cannot be material that the parties made their agreement on a contrary supposition. . . .

Stevens v. Lynch, where the holder of a bill had given time to the acceptor, and the drawer waived the benefit of that circumstance, is not applicable to the present case. As to *Lee v. Muggeridge* and the other cases which have turned upon moral obligation, it is sufficient to say that here no moral obligation appears for the first guaranty, and the declaration does not allege any consideration for the second guaranty, but the abandonment of the first.

Cur. adv. vult.

LORD ABINGER, C. B., in the same Vacation (June 29th) delivered the judgment of the Court.

In the case of *Brooks v. Haigh* the judgment of the Court is to affirm the judgment of the Court of Queen's Bench.

It is the opinion of all the Court that there was in the guaranty an ambiguity that might be explained by evidence, so as to make it a valid contract; and therefore this was a sufficient consideration for the promise declared upon.

It is also the opinion of all the Court, with the exception of my brother MAULE, who entertained some doubt on the question, that the words both of the declaration and the plea import that the paper on which the guaranty was written was given up; and that the actual surrender of the possession of the paper to the defendant was a sufficient consideration without reference to its contents.

Judgment affirmed.

ENGLAND v. DAVIDSON.

IN THE QUEEN'S BENCH, MAY 5, 1840.

[Reported in 11 *Adolphus & Ellis*, 856.]

ASSUMPSIT. The declaration stated that heretofore, to wit, &c., the defendant caused to be published a certain hand-bill, placard, or advertisement, headed "Fifty pounds reward;" whereby, after reciting that, late on the night of, &c., the mansion-house of defendant, at, &c., was feloniously entered by three men, who effected their escape; that two men had been taken into custody on suspicion of having been concerned in the felony; and that a third, supposed to belong to the gang, had been traced to Carlisle, and was of the following description, &c., the defendant did promise and undertake that whoever would give such information as should lead to the conviction of the offender or offenders should receive the above reward: that plaintiff, confiding,

&c., did afterwards, to wit, on, &c., give such information as led to the conviction of one of the said offenders, to wit, one David Robson; and that afterwards, to wit, at the Assizes for Northumberland, D. R., who was guilty of the said offence, to wit, the feloniously entering, &c., was in due course of law convicted of the said offence of feloniously entering, &c., in consequence of such information so given by plaintiff; of all which said several premises defendant afterwards, to wit, on, &c., had notice, and was then requested by plaintiff to pay him the said sum of 50*l.*; and defendant afterwards, to wit, on, &c., in consideration of the premises, then promised plaintiff to pay him the sum of 50*l.* Breach: that, although defendant, in part performance of his said promise and undertaking, to wit, on, &c., did pay to plaintiff the sum of 5*l.* 5*s.*, in part payment of the said sum of 50*l.*, yet, &c. (breach: non-payment of the residue).

Third plea: That heretofore, and long before and at the time when the house of defendant was so feloniously entered, and continually from thence hitherto, plaintiff was, and now is, a constable and police officer of the district where the said house of defendant is situate, and the said offence was committed; and it then was the duty of plaintiff, as such constable and police officer, to have given and to give every information which might lead to the conviction of the said offender, and to apprehend him and prosecute him to conviction, if guilty, without any payment or reward to him made in that behalf: that, by the said advertisement partly set out in the declaration, defendant gave notice and promised that whoever would give such information to plaintiff, therein described as police officer Hexham, as should lead to the conviction of the offender or offenders, should receive the said reward in the said advertisement mentioned, and in no other manner whatever: and that, by reason of the premises, the said promise was and is void in law. Verification.

Demurrer: assigning for causes that the plea amounts to the general issue, and does not deny, or confess and avoid, and is multifarious, and tenders an immaterial issue. Joinder.

Ingham now appeared for the plaintiff; but the Court called on

Martin, for the defendant. No consideration is shown on this record for the defendant's promise; the plaintiff was bound to do that, the doing of which is stated as the consideration. The duty of a constable is to do his utmost to discover, pursue, and apprehend felons. Com. Dig., Leet (M. 9), (M. 10); Justices of Peace (B. 79). It has been laid down that a sailor cannot recover on a promise by the master to pay him for extra work in navigating the ship, the sailor being bound to do his utmost, independently of any fresh contract. *Harris v. Watson*,¹ explained by Lord Ellenborough in *Stilk v. Myrick*.² The principle was recognized in *Newman v. Walters*,³ where the case of a passenger was distinguished. [COLERIDGE, J. Those cases turn merely on the

¹ Peake, N. P. C. 72.

² 2 Campb. 317; s. c. 6 Esp. 129.

³ 3 B. & P. 612.

nature of the contract made by the sailor.] If the duty here incumbent on the plaintiff was to do all that the declaration lays as the consideration, the case is the same as if he had been under a previous contract to do all. The cases on the subject of consideration are collected in note (b) to *Barber v. Fox*.¹ [*Ingham*. The constable was not bound to procure evidence.] The contract here declared upon is against public policy.

LORD DENMAN, C. J. I think there may be services which the constable is not bound to render, and which he may therefore make the ground of a contract. We should not hold a contract to be against the policy of the law, unless the grounds for so deciding were very clear.

LITLEDALE, PATTESON, and COLERIDGE, JJ., concurred.

Judgment for the plaintiff.

HERRING v. DORELL.

IN THE QUEEN'S BENCH, TRINITY TERM, 1840.

[*Reported in 8 Dowling's Practice Cases, 604.*]

R. V. Richards showed cause against a rule *nisi*, obtained by *V. Williams* for arrest of judgment or a new trial in this case. The case had been tried before the sheriff of Brecon, and a verdict found in favor of the plaintiff for 2*l.* 10*s.* 1*d.* The ground of seeking to arrest the judgment was, that no sufficient consideration for the promise by the defendant was disclosed on the face of the declaration. The substance of the declaration was, that a person named Watkins and a person named Voss were joint debtors to the plaintiff. The plaintiff proceeded against them, and ultimately took Watkins and Voss in execution. An arrangement was made between Watkins and the plaintiff, and accordingly the former was discharged out of custody. Voss remained in custody, and in consideration of the discharge of Voss, the declaration alleged that the defendant undertook to pay the sum of 2*l.* 10*s.* 1*d.* due from Voss to the plaintiff, and Voss was accordingly discharged. It was contended in support of the rule that, the plaintiff having discharged Watkins, who was jointly liable with Voss, that had the effect of entitling Voss to his discharge. *Richards* submitted that, even after the discharge of Watkins, some step being necessary in order to obtain the discharge of Voss, some portion of his imprisonment, until that step could be taken, must be considered as lawful. Suppose the prisoners had been confined in two different

¹ 2 Wms. Saund. 137*a.* See also *Jones v. Waite*, 5 New Ca. 341, 351, 356; *Haigh v. Brooks*, 10 A. & E. 309.

gaols, one in Cornwall and the other in Northumberland, and one of them was discharged in Cornwall, some time must be allowed in order to discharge the other defendant from the gaol in Northumberland. The detention of the second defendant until his discharge must be considered as lawful. The smallest consideration was sufficient to support the promise alleged in the declaration, and here was some consideration for that purpose. If the proceeding could be considered as a nullity, then the plaintiff would be liable to an action of trespass; but in *Crozer v. Pilling*,¹ it appeared that an action on the case was the proper remedy, and not an action of trespass. There it was held that a plaintiff is bound to accept from a defendant in custody under a *ca. sa.* the debt and costs when tendered in satisfaction of the debt, and to sign an authority to the sheriff to discharge the defendant out of custody; and that an action on the case will lie against the plaintiff for maliciously refusing so to do. The case of *Smith v. Eggington*² was an authority to the same effect. The imprisonment was legal in its commencement, and therefore the sheriff could not be liable as a trespasser. It was not therefore a void imprisonment. The case of *Atkinson v. Bayntun*³ was an authority to show that sufficient consideration was disclosed on the face of this declaration to support the defendant's promise. The marginal note was: "M. being in custody on execution pursuant to a warrant of attorney, by which he had agreed that execution should issue from time to time for certain instalments of a mortgage debt, defendant, in consideration that plaintiff would discharge M. out of custody, undertook that he should, if necessary, be forthcoming for a second execution. Held, that defendant's was a valid contract." He cited *Sturlyn v. Albany*, and *Pullin v. Stokes*.⁴ There, A. having recovered judgment against B., and a *fi. fa.* being delivered to the sheriff, in consideration that A. at the special request of C. had requested the sheriff not to execute the writ, C. promised to pay A. the debt and costs, together with the sheriff's poundage, bailiff's fees, and other charges. On a judgment by default and error brought, the promise was holden to be binding on C., though it was not averred that the sheriff did in fact desist from the execution, nor what the amount of the poundage, &c., was, nor that the defendant had notice of such amount. In the present case, Voss was not taken in execution after the discharge of Watkins, but both were legally in custody at the time of Watkins's discharge. The detention of one prisoner in such a case could not be considered as a trespass. But suppose it should be said that the plaintiff was bound to take steps to discharge Voss; if he was, he was entitled to a reasonable time for that purpose. During the time that elapsed before his actual discharge, he was in legal custody. That custody furnished a sufficient consideration to support the defendant's promise.

V. Williams, in support of the rule. This was an action on a promise

¹ 4 B. & C. 26

² 6 Dowl. P. C. 38.

³ 1 B. N. C. 444.

⁴ 2 H. Bl. 312.

alleged to have been made by the defendant to pay a certain debt due from Voss, who was in custody, if the plaintiff would release him. The joint debt of the two had in point of law been satisfied by taking the defendants, Watkins and Voss, in execution, and discharging Watkins out of custody. It was therefore no consideration for the plaintiff to consent to the discharge of Voss out of custody, since it was that to which he was absolutely entitled. Here was an execution against two joint debtors. They were both taken in execution. The plaintiff consented to the discharge of one of them. The authorities shewed that the legal operation of the discharge of one of two joint debtors, was the discharge of the debt. The imprisonment of the latter debtor, therefore, was clearly illegal. He cited *Clarke v. Clement*,¹ *Nadin v. Battie*,² *Good v. Wilks*,³ *Basset v. Salter*.⁴ In the last case, even an escape with the consent of the plaintiff was held to be sufficient to prevent him from ever taking the defendant in execution for the same matter. The discharge of Watkins operated as if there had been actual payment of the debt. If so, then it must be contended, on the other side, that if the whole debt had been paid, that would afford a good consideration for such a promise. In the case of *Crozer v. Pilling* it was held, that an action on the case would lie for detention of the defendant after a tender of the debt and costs, in consequence of the plaintiff not signing a discharge. With respect to the sufficiency of the consideration in the present case, *Atkinson v. Settree* was an authority to show that the consideration here was insufficient. There it was held that if A. be illegally arrested by B. for a debt, a promise by C. to pay the debt claimed by B., in consideration of B.'s releasing A. out of custody, is void. He cited *Stilk v. Myrick*,⁵ *Harris v. Watson*.⁶

COLERIDGE, J. The question in this case, whether this was a good consideration or not, depends upon the situation of Voss at the time of his discharge. Both he and Watkins had been taken under a joint execution. Watkins made certain terms with the plaintiff, and the latter voluntarily discharged him. No terms were made as to the situation of Voss; his rights were, therefore, to be considered according to the situation in which the law had placed him. Suppose Watkins alone had been in custody, it is clear that the voluntary discharge of him would have been a discharge of the debt, and no other proceedings could have been taken to recover it. It seems to me, in the same way, that the discharge of Watkins operated to release Voss, his co-debtor. I think therefore, both on principle and authority, that this rule ought to be made absolute.

Rule absolute.

¹ 6 T. R. 525.

² 2 Mod. 136.

³ 5 East, 147.

⁴ 2 Campb. 317.

⁵ 6 Mau. & S. 413.

⁶ Peake's Ca. 72.

SMITH AND ANOTHER v. MONTEITH.

IN THE EXCHEQUER, NOVEMBER 18 & 20, 1844.

[Reported in 13 Meeson & Welsby, 427.]

ASSUMPSIT. The declaration stated that an action had been commenced by the plaintiffs against one Charles J. Dunlop, for the recovery of a certain sum of money, to wit, the sum of 83*l.* 6*s.* 11*d.*; that said Dunlop, being about to leave England, had been arrested and was in custody of the sheriff, under a writ of *capias* duly issued by the order of a judge in said action; that costs and charges to a certain amount, to wit, the amount of 20*l.* had been incurred by the plaintiffs in the prosecution of said action and the arrest of said Dunlop; and thereupon, in consideration that the plaintiffs, at the request of the defendant, would discharge the said Dunlop from said custody, the defendant undertook and promised the plaintiffs to pay to them the sum of 88*l.* for the debt, interest, costs and charges of the plaintiffs in said action, when he, the defendant, should be thereunto afterwards requested; that the plaintiffs, confiding in said promise, did discharge said Dunlop from said custody; (averment of notice and request to pay said sum of 88*l.* for debt, interest and costs). Breach: non-payment.

Plea: that there was not any claim or demand, or cause of action against said Dunlop, in respect whereof the plaintiffs could or were entitled to recover in the said action the said sum which the defendant so promised to pay, or any other sum or sums, matter or thing; and the plaintiffs did not, by discharging said Dunlop from custody, give up or part with any available remedy against the said Dunlop, as the plaintiffs at all times well knew, but which the defendant, at the time of making said promise, did not know; and the defendant says that said arrest and detaining in custody, and the proceedings in said action were, on the part of the plaintiffs, colorable only, and the same were not procured, commenced, or prosecuted by the plaintiffs for the purpose or with the intent of trying any doubtful or contested question of law or fact. Verification.¹

Special demurrer, assigning for causes, among others, that the plea does not in any manner answer the declaration; that it neither traverses any allegation therein, nor confesses and avoids the cause of action therein stated; that the contract of the defendant stated in the declaration is an original contract, founded on a new consideration, altogether distinct and different from the cause of action against the said C. J. Dunlop, such consideration for the defendant's promise being an act done by the plaintiffs for the benefit of the said C. J. Dunlop,

¹ In this and a few other cases the statement of the pleadings has been curtailed of some of its verbiage. — Ed.

at the request of the defendant, and such benefit to the said C. J. Dunlop being precisely the same whether the plaintiffs had or had not any cause of action against him; and therefore the question, whether the plaintiffs had any cause of action against the said C. J. Dunlop, is in this action wholly immaterial.

The plaintiffs' points marked for argument were, that the plea is bad in substance, and is no answer to the declaration. The consideration alleged is, the discharge of Dunlop out of custody of the sheriff at the request of the defendant, which discharge was a benefit to Dunlop, which he could not have obtained without the act of the plaintiffs in giving the discharge to the sheriff, whether the plaintiffs could have proved their debt against Dunlop or not, and which discharge materially altered the situation of the plaintiffs by allowing Dunlop to leave the kingdom. And therefore the question as to whether there was another and what distinct consideration, not alleged in the declaration, is in this action immaterial. The plaintiffs will also contend, that the plea, if it amounts to any thing, is an argumentative denial of there being any consideration for the promise of the defendant, and is therefore bad, as amounting to the general issue. Also that, supposing the want of consideration for the promise may be specially pleaded, the plea is bad because it negatives one particular species of consideration only, namely, that of damage to the plaintiffs, whereas damage to the plaintiffs is not alleged in the declaration; and it is quite consistent with the plea that there was a good consideration for the promise, either by benefit to Dunlop at the request of the defendant, which in fact there was, or benefit to the defendant himself. Also that the plea, consisting of matter in denial only, ought not to have concluded with a verification. Also that the plea is double, in alleging that there was no debt due from Dunlop, and that the arrest was colorable only, such defences being separate and distinct, which cannot both be put in issue without rendering the replication double. And lastly, that the plea contains no matter upon which any material issue can be taken.

The defendant's points were, that the declaration is insufficient and bad; that it does not disclose any sufficient consideration to support the action; that it is not alleged therein that there was a good cause of action, or a doubtful claim, on which the action mentioned in the declaration was founded, or that the plaintiffs had any right to continue Dunlop in custody; and that it is not shown that the plaintiffs sustained any damage by his discharge from custody.

Crompton, in support of the demurrer. This plea is bad both in form and substance. The declaration shows a good consideration for the alleged promise. For even supposing no debt to have been due from Dunlop, and the plaintiffs to have known that at the time of the promise and discharge, still the consideration is sufficient, for Dunlop was legally in custody, and had no right to require the other party to procure his discharge. The consideration is the doing of a collateral act, namely, the discharging of Dunlop, which was a benefit to him

and a prejudice to the plaintiffs. He was in custody under a judge's order, and the act of the plaintiffs in procuring his discharge is a good consideration for the defendant's promise. It nowhere appears that the arrest was illegal. It is no doubt alleged in the plea that the arrest was colorable only, but that word as here used has no definite or distinct meaning of itself; and the declaration shows that the arrest was obtained by the order of a judge, and that the proceedings were regular. [POLLOCK, C. B. Are you aware of the case of Longridge v. Dorville?] Yes; in that case the giving up of a suit intended to try a question respecting which the law was doubtful, was held to be a good consideration for a promise to pay a stipulated sum; and the reason for that decision was, that the plaintiff relinquished a benefit which he might otherwise have had. So here, the plaintiffs lost the right to all claim in respect to the costs incurred. There was a positive benefit to Dunlop by his immediate discharge from custody, which he could not otherwise have obtained, except by procuring himself to be bailed, supposing he could have obtained bail. This was not a case of mere forbearance, but of an act done by the plaintiffs at the defendant's request, which was a benefit to him, or to the person whose discharge was thus obtained. The position of the plaintiffs is altered by Dunlop's discharge out of custody. The circumstance of the sum for which he was arrested being less than that agreed to be paid by the defendant is quite immaterial, as the slightest consideration will in law support the heaviest promise. The plea discloses no ground of fraud or duress. In *Butcher v. Steuart*¹ the arrest was irregular, and yet the discharge from execution was held a sufficient consideration for the defendant's promise. In that case Parke, B., says: "The case states in substance that Robert Steuart was arrested under a writ, irregular in itself, and from which arrest he might possibly have been entitled to be discharged out of custody by virtue of his privilege as a member of Parliament (a point on which it will not be necessary for us to give any opinion, as I think the undertaking for his discharge was an ample consideration); that the plaintiff released him from his debt, without entering into any question as to his right to be discharged generally, and without putting the defendant to the trouble of applying to the Court on the ground of the irregularity in the writ, an application which after all might not be successful, as the Court would probably have amended it. A discharge from such an execution is an ample consideration for the promise." And in *Edwards v. Baugh*, Lord Abinger, C. B., said: "Where an action is depending, the forbearing to prosecute it is a sufficient consideration for a promise to pay a certain sum of money; for, besides other advantages, the party promising would save the extra costs which he would have to pay, even if he were successful."

Peacock, contra. The declaration is insufficient. It contains no

¹ 11 M. & W. 857.

allegation that the plaintiffs had a good cause of action, or even a doubtful claim against Dunlop, or that they had any right to detain him in custody. It does not state that the sum of 83*l.* 6*s.* 11*d.* was due, but merely that an action had been commenced and was depending for the recovery of it; and that, Dunlop being about to leave England, he had been arrested, and was in custody of the sheriff, under and by virtue of a writ of *capias* duly issued in the said action. The word "duly" only means that it was issued in due form. That was decided by *Butcher v. Steuart*. The consideration alleged here is not a forbearance to sue, but a mere discharge out of the custody of the sheriff. The declaration does not show that any debt was really due, or that there was any color for the arrest; but the plea does show that there was not, for it expressly avers that there was not any claim or demand or cause of action against Dunlop, in respect of which the plaintiffs could or were entitled to recover. It states, moreover, that there was no color or pretence for the arrest, and that the plaintiffs well knew they did not part with any available remedy by this discharge. If a party, knowing he has no ground of action, causes another to be arrested, his afterwards causing him to be discharged from custody is no consideration for a promise by a third person to pay him a sum of money for so doing. It is not every benefit that will form a good consideration; and if a man is illegally in custody, the law will not regard his discharge as any benefit. Here Dunlop was only released from custody when in fact the plaintiffs were not entitled to detain him. Suppose a tenant for life were to say he would commit waste, and put the party in remainder to the necessity of going into equity to obtain an injunction, unless he would pay him a sum of money; his not committing waste in pursuance of such an agreement would form no consideration for a promise to pay the money, either by the party entitled to sue for waste or by a third person; unless, perhaps, it were doubtful whether the act were waste or not, or whether the party about to do the act were or were not entitled to commit waste. Here it is admitted by the demurrer that the action against Dunlop was not brought with the intention of trying any doubtful question either of fact or of law, as in the case of *Longridge v. Dorville*, which is therefore distinguishable. There was no loss to the plaintiffs if they were not entitled to recover any thing, and there was no benefit in law to Dunlop, or to any one else; for, being wrongfully detained, the law supposes he would obtain compensation. In the case of *Atkinson v. Settree* it was held that, if a person be illegally sued by another for a debt, a promise by a third person, in consideration of the plaintiff's releasing him out of custody, to pay the debt claimed, is void. So in *Herring v. Dorell*, where a plaintiff discharged one of two joint debtors, a promise by a third person to pay the debt, in order to obtain the discharge of the other defendant in custody, was held to be void for want of consideration. That is a stronger case than the present, because there the plaintiff was entitled to make the arrest, and the parties were rightfully in custody.

In an action against the sheriff for the escape of a prisoner on mesne process, a debt must be stated and proved. *Alexander v. Macauley*.¹ And in declaring on a promise to pay the debt of a third person in consideration of forbearance, it is necessary to show a good consideration, which in a case like the present could only be a demand recoverable at law or in equity. *Barrell v. Trussell*.² The case of the Duke de Cadaval *v. Collins*³ shows that money paid under compulsion of colorable legal process may be recovered back. [PARKE, B. The plea does not aver that the plaintiffs maliciously sued out the writ.] It is not necessary to show, in order to support the plea, that Dunlop could maintain an action for maliciously suing out the writ; it is sufficient that it was sued out without any color or ground of action.

Crompton, in reply. The plaintiffs' case has not been answered by the argument on the other side. The declaration discloses a good consideration and promise, and there is nothing to show that it was made under circumstances of duress or illegality. [PARKE, B. The argument for the defendant is, that the plea confesses a good consideration by the suspension of the action, but avoids it by showing that the action was brought without foundation, to the knowledge of the plaintiff.] The question is, Does it so avoid the cause of action? The facts alleged in the plea do not show any want of consideration or illegality. [POLLOCK, C. B. The substance of the plea is, that there was no claim or demand in the action against Dunlop, and no disputed question of law or fact; and this the plaintiffs knew at all the times necessary to be stated in the plea, whereas the defendant knew nothing of it. If there was either a good claim, or a reasonable disputed ground of controversy, that is sufficient.] There is nothing alleged to show that the arrest of Dunlop was not legal. The plea is in truth a mere plea of general injustice, and constitutes no defence in point of law. It is a mistake to suppose that there is any relation of principal and surety between these parties. The contract between the present plaintiffs and the defendant is not limited by the amount or nature of the original debt. If A. agrees with B. that, if B. will go to York, A. will pay him a certain sum, it is no answer to an action on this agreement, that B. has already contracted with some other person to go to York, which A. did not know, and that he will be there at all events. The plea really amounts to no more than this, that the plaintiffs knew that in that precise form of action they might be precluded from recovering against Dunlop, although they had a *bona fide* claim, because in that action Dunlop might set up a plea of some colonial act, or of the Statute of Limitations. [PARKE, B. To sustain this plea, it is certainly necessary to show that the plaintiffs had no cause of action, and no possibility of recovering against Dunlop, whatever might be the form of pleading.] Surely any holding of another by the Queen's writ must operate to create a good consideration for its suspension. "Duress

¹ 4 T. R. 611.² 4 Taunt. 117.³ 4 Ad. & Ell. 858.

cannot be where a party is in prison by the King's writ." Anon., 1 Lev. 68. But it is impossible to tell what is the precise legal defence set up by this plea—whether it be duress, or illegality, or fraud. With respect to the cases cited on the other side, that of *Atkinson v. Settree* is no authority against the plaintiff, but rather the contrary. There the question was, whether the arrest in the inferior court was not wholly void and illegal; and the *dictum* is only that, if it was,—so that the party would be a trespasser by keeping the defendant in custody,—the discharging him from such arrest could be no consideration for a promise by a third party to pay the debt. Here the arrest was perfectly legal and regular. In that case there was no authority to arrest, and no legal custody whatever, by reason of the want of jurisdiction in the inferior court. The decision of Coleridge, J., in *Herring v. Dorell*, does not bear directly on the present case. There, the one defendant being discharged, the continuance in custody of the other was clearly illegal. He had strictly a right to his discharge on an *audita querela*, and the Court would not put him to that remedy but discharge him on motion. *Barrell v. Trussell* has no application to this case; it was a question on the Statute of Frauds, and it is only the *dictum* of Heath, J., that can be cited as having the least bearing on the question now before the Court. In *Edwards v. Baugh* and *Butcher v. Steuart*, the point in decision was quite different from this. The case of the Duke de Cadaval *v. Collins* is rather in favor of the plaintiff. That not only was a case of gross extortion from the plaintiff, but the writ against him had previously been set aside for irregularity. In *Greenleaf v. Barker*¹ it is said that "every consideration must be for the benefit of the defendant or some other at his request, or a thing done by the plaintiff for which he laboreth or hath prejudice." The present case falls within that definition; for here there was a benefit to Dunlop at the defendant's request, and a "labor and prejudice" to the plaintiffs, who relinquished the benefit they had by his arrest. And the plea cannot mean more than this, that, in the form of proceedings actually adopted, there was something to prevent them from recovering against Dunlop,—not even an answer in merits or substance. The plea would be proved, if in that action there were a misjoinder which prevented the plaintiffs from recovering. If, instead of merely making a promise to pay, the defendant had actually paid the debt, he could not have recovered it back in an action for money had and received. Here Dunlop receives a benefit by his immediate release to which he was not entitled by law, because at all events he must have put in bail. It is not said that the arrest was malicious. [PARKE, B. No; the plea discloses nothing to show that the original defendant had any right of action for the arrest, because it neither avers that the plaintiffs knew the action to be unfounded, nor that the arrest was malicious.] That really makes an end of the case. Dunlop could not have had any

¹ Cro. Eliz. 194.

compensation for the arrest, and so he obtained a benefit in law, as well as in fact, by his discharge. It is perfectly immaterial to the maintenance of the action how small is the consideration, or how large the promise.

POLLOCK, C. B. I am of opinion that the plaintiffs are entitled to the judgment of the Court. This is an action against the defendant, founded on a promise by him to pay a sum of money, in consideration of the discharge out of custody of a defendant in a former action, who had been arrested at the suit of the plaintiffs. For aught that appears that arrest was legal, and the party was in lawful custody: this is not therefore a case of duress; neither can it be put as a case of fraud, for there is no sufficient allegation of fraud in any part of the plea. The substance of the plea is, that there was not any claim or demand, or cause of action, in respect of which the plaintiffs were entitled to sue the defendant in the former action; but there is no averment that the plaintiffs were aware of that; and, for any thing that is stated in the plea, the original inception of that action was perfectly *bona fide*, although the plaintiffs may have been mistaken as to their remedy, or the form of proceedings adopted by them. The plea goes on to state that the plaintiffs did not, by discharging Dunlop, give up or part with any available remedy against him. The words "available remedy" are rather loose and vague; they may mean several things; they would be satisfied by the fact of Dunlop being a mere pauper, for it is not stated that the plaintiffs had no legal right or remedy which they gave up, but merely that they had no available remedy. So, also, those words would be satisfied if there were some latent defect which might appear in pleading, or come out in evidence; yet the action might be honestly commenced, and the claim founded in justice; and it cannot be said that, because the proceedings were open to such latent defect the defendant's promise would not be founded on a good consideration. And this is the only part of the plea as to which there is any averment of the plaintiff's knowledge. It then goes on to say, that the action against Dunlop was not brought for the purpose of trying any doubtful or contested right. It seems to me that the declaration in its form calls for an answer, and that this plea is no sufficient answer. I agree with the general scope of Mr. Peacock's argument. If a party does an illegal act, or if he abuses the process of the court, to make it the instrument of oppression or extortion, that is a fraud on the law; and if the original arrest, or the continuance of that arrest, were of that character, and were shown to be so by proper averments in the plea, that would very probably constitute a good defence to an action like the present. But this plea falls far short of that, the arrest being legal, and there being no averment of knowledge on the part of the plaintiffs, except that they knew they did not part with any available remedy by discharging Dunlop out of custody. It does not therefore contain a sufficient statement in fact to bring it within the scope of Mr. Peacock's argument, or the cases cited by him. The judgment must therefore be for the plaintiffs.

PARKE, B. I am also of opinion that the plaintiffs are entitled to judgment. In the first place, I think that the declaration is sufficient on general demurrer. It states that an action had been brought and was depending at the suit of the plaintiffs against a person of the name of Dunlop, and that he had been arrested and was in custody on a *capias* duly issued in that action. On such a statement it must be intended, *prima facie*, that the action was well founded, and the writ regularly and properly issued. That doctrine is laid down in the case of *Bidwell v. Catton*. That was an action of assumpsit on a promise by the defendant to pay 50*l.*, in consideration of the plaintiff's forbearing to prosecute a suit; and after verdict it was objected in arrest of judgment, first, that it was not alleged that the plaintiff had any just cause of action, and, secondly, that the action still remained. But the Court nevertheless gave judgment; "for, first, suits are not presumed causeless, and the promise argues cause, in that he desired to stay off the suit; secondly, though this did not require a discharge of the action, yet it requires a loss of the writ and a delay of the suit, which was both benefit to the one and loss to the other." Therefore I think, *prima facie*, this declaration is sufficient, the former action being presumed to be for cause, and the *capias* being presumed to have been properly issued. There is another case which I may advert to, to the same effect, of *Pooley v. Lady Gilberd*.¹ There it is stated, that "the plaintiff had preferred a bill in chancery against the defendant for marriage money by her received. The defendant upon this, in consideration that the plaintiff would stay the suit there by him commenced, did assume to pay him 100*l.*, and also to deliver up a bond of 40*l.*, which she had. Upon this promise the plaintiff made stay of his suit, but the defendant not performing the promise, upon this the action was brought, and a verdict found for the plaintiff. It was moved for the defendant, in arrest of judgment, that the declaration was not good, for that there was no good ground to raise the promise, there being no sufficient consideration for the same, for it doth not appear in the declaration that the suit in chancery was a lawful suit to be there determined, and so, if the suit was not lawful, the consideration to forbear such a suit was no good consideration to raise a promise." But the court say that, "if the plaintiff had only a *subpœna* out of chancery against the defendant, and did not make the cause thereof known to him, — if he, in consideration that he would not prosecute any farther against him, did assume to pay him so much, this clearly is a good consideration to raise a promise." Upon these authorities, and upon principle, this declaration is sufficient.

Then the question is, whether the plea, which must be construed most strongly against the defendant, discloses any answer. I agree with Mr. Crompton, that it is difficult to see upon what principle the plea is constructed. No doubt it shows a *prima facie* case of hardship

¹ 2 Bulstr. 41.

and injustice upon the defendant in the former action ; but the question is, whether it discloses a legal defence to this action. It does not show that the arrest was illegal ; and it certainly is not sufficient on the ground of fraud, because there is no averment of any false statement or misrepresentation of fact in order to procure the arrest ; still less does it disclose any ground of duress, since all the averments show that the imprisonment was lawful. If it be good at all, it must be on the ground of want of consideration for the defendant's promise. Now, it seems to me that the plea does not disclose sufficient matter to show a want of consideration. Taking it most strongly against the plaintiffs, in substance it is no more than this, that the plaintiffs had no claim or cause of action which could have been enforced against Dunlop ; but it does not allege that the plaintiffs knew that fact. It must be taken, therefore, that the *capias* on which Dunlop was arrested was regularly and duly obtained ; and the plea does not show that the plaintiffs were guilty of any illegal conduct, that they acted illegally in making the arrest, or from malicious motives, or that the arrest was without reasonable or probable cause. Dunlop, therefore, as it must be assumed, was in custody at the suit of the plaintiffs under process which was legal and regular ; and that being so, the discharge from such an arrest is quite a sufficient consideration to support the promise laid in this declaration ; and I entirely agree that we cannot inquire into the *quantum* or amount of consideration. Upon the face of the plea, therefore, there was a legal arrest ; and the discharge from that arrest, under which the payment of the debt might have been obtained, was a benefit to Dunlop, quite sufficient to found a consideration for a promise to pay that debt. For these reasons I am of opinion that the plea furnishes no sufficient answer to the declaration, and that our judgment must be for the plaintiffs.

GURNEY, B. I am of the same opinion. To make the plea a sufficient answer, it ought to have shown, either that the plaintiffs acted illegally or fraudulently in making the arrest, or that they practised some fraud on the defendant. It shows neither, and therefore is no sufficient answer.

Judgment for the plaintiffs.

SHADWELL v. SHADWELL AND ANOTHER, *Executors, &c.*

IN THE COMMON PLEAS, NOVEMBER 26, 1860.

[Reported in 30 *Law Journal Reports*, C. P. 145.]

THE declaration stated that the testator in his lifetime, in consideration that the plaintiff would marry Ellen Nicholl, agreed with and promised the plaintiff, who was then unmarried, in the terms contained in a writing in the form of a letter addressed by the said testator to the

plaintiff, which writing was and is in the words, letters, and figures following, that is to say : —

11TH AUGUST, 1838, GRAY'S INN.

MY DEAR LANCEY, — I am glad to hear of your intended marriage with Ellen Nicholl; and, as I promised to assist you at starting, I am happy to tell you that I will pay to you one hundred and fifty pounds yearly during my life, and until your annual income derived from your profession of a chancery barrister shall amount to six hundred guineas, of which your own admission will be the only evidence that I shall receive or require.

Your ever affectionate uncle,

CHARLES SHADWELL.

Averment: That the plaintiff did all things necessary, and all things necessary happened, to entitle him to have the said testator pay to him eighteen of the said yearly sums of 150*l.* each respectively; and that the time for the payment of each of the said eighteen yearly sums elapsed after he married the said Ellen Nicholl, and in the lifetime of the said testator; and that the plaintiff's annual income derived from his profession of a chancery barrister never amounted to six hundred guineas, which he was always ready and willing to admit and state to the said testator; and the said testator paid to the plaintiff twelve of the said eighteen yearly sums which first became payable, and part, to wit, 12*l.*, of the thirteenth; yet the said testator made default in paying the residue of the said thirteenth yearly sum, which residue is still in arrear and unpaid, and in paying the five of the said eighteen yearly sums which last became payable, and the said five sums are still in arrear and unpaid.

Fourth plea: That before and at the time of the making of the supposed agreement and promise in the declaration mentioned, the said marriage had been and was, without any request by or on the part of the testator touching the said intended marriage, but at the request of the plaintiff, intended and agreed upon between the plaintiff and the said Ellen Nicholl, of which the testator, before and at the time of making the supposed agreement and promise, also had notice; and the said marriage was, after the making of the supposed agreement and promise, duly had and solemnized as in the declaration mentioned, at the request of the plaintiff and without the request of the testator. And the defendants further say that, save and except as expressed and contained in the writing set forth in the declaration, there never was any consideration for the supposed agreement and promise in the declaration mentioned, or for the performance thereof.

Fifth plea: To part of the claim of the plaintiff, to wit, so much thereof as accrued due in and after the year 1855, the defendants say that, although the supposed agreement and promise in the declaration mentioned were made upon the terms then agreed on by the plaintiff and the testator, that the plaintiff should continue in practice and carry on the profession of such chancery barrister as aforesaid, and should not abandon the same; yet that, after the making of the said

agreement and promise, and before the accruing of the supposed causes by this plea pleaded to and in the declaration mentioned, or any part thereof, the plaintiff voluntarily, and without the leave or license of the testator, relinquished and gave up and abandoned the practice of the said profession of a chancery barrister, which before and at the time of the said making of the said supposed agreement and promise he had so carried on as aforesaid; and although the plaintiff could and might, during the time in this plea and in the declaration mentioned, have continued to practise and carry on that profession as aforesaid, yet the plaintiff, after such abandonment thereof, never was ready and willing to practise the same as aforesaid, but practised only as a revising barrister, that is to say, as a barrister appointed yearly to revise the list of voters for the year for the county of Middlesex, according to the provisions of the statutes in that behalf, by holding open courts for such revision at the times and places in that behalf provided by the said statutes.

Second replication to the fourth plea: That the said agreement declared on was made in writing, signed by the said testator, and was and is in the words, letters, and figures following, and in none other, that is to say (setting out the letter as in the declaration above). Averment: That the plaintiff afterwards married the said Ellen Nicholl, relying on the said promise of the said testator, which at the time of the said marriage was in full force, not in any way vacated or revoked; and that he so married while his annual income derived from his profession of a chancery barrister did not amount, and was not by him admitted to amount, to six hundred guineas.

Second replication to the fifth plea: That the said agreement declared on was in writing, signed by the said testator, and was and is in the words, letters, and figures set out in the next preceding replication, and in none other; and that the terms upon which it is in the fifth plea alleged that the said agreement and promise were made, were no part of the agreement and promise declared on, and the performance of them by the plaintiff was not a condition precedent to the plaintiff's right to be paid the said annuity.

Demurrers to the replications to the fourth and fifth pleas. Joinder in demurrer.

Bullar, in support of the demurrers (Nov. 9). The letter declared on discloses no consideration for the promise of the testator. It was nothing more than a voluntary kindness on his part; and no intention is expressed in the letter to make it binding on him. *Hawes v. Armstrong*.¹ The promise to pay the annuity is not in consideration that "you will marry Ellen Nicholl," but it refers to a previous promise to assist the plaintiff "at starting," and that more naturally refers to his starting in his profession than to his starting in married life. And even if it be taken as referring to his starting in married life, the marriage

¹ 1 Bing. N. C. 761.

is referred to in the letter as an obligation already incurred on the part of the plaintiff; the consideration, therefore, on which the testator's promise was based, was a consideration that the plaintiff should do what he was already bound to do; and that is not sufficient. *Wennall v. Adney*,¹ *Eastwood v. Kenyon*, *Rann v. Hughes*, *Hopkins v. Logan*, *Stilk v. Myrick*,² *Clutterbuck v. Coffin*,³ *Cowper v. Green*; ⁴ *Pothier on Obligations*, by Evans, 25; *Crowhurst v. Laverack*.⁵ As to the fifth plea, the question is whether the plaintiff's continuance at the bar was made a condition precedent to his right to the annuity. It is submitted that it was, and that when the plaintiff voluntarily abandoned his profession, his right to the annuity ceased, just as a covenant to pay rent during a term may be put an end to by the covenantee putting an end to the term.

V. Harcourt, in support of the replications. It is true that where the contract must be in writing, the consideration must appear on the face of the contract; but that is not so where the contract need not be in writing, — *Shortrede v. Cheek*; ⁶ and it was not necessary that the contract in this case should be in writing, for the Statute of Frauds does not apply where the promise is founded on a consideration executed. *Souch v. Strawbridge*,⁷ *Green v. Saddington*,⁸ and *Chitty on Contracts*, 456. But assuming that the consideration must appear in the writing containing the promise, it sufficiently appears in this case. The plaintiff having made an engagement to marry, the testator promised to assist him on starting in married life, viz., by giving him an annuity; and the plaintiff, relying on that promise, married. It is said, on the other side, that the plaintiff had already incurred an obligation to marry, and that a promise based on the consideration that he would fulfil that obligation is void. But the *quantum* of consideration is not material; and it is quite consistent with these pleadings that the plaintiff changed his condition sooner than, but for the testator's promise, he would have done, or even that but for that promise, he might have broken off the engagement altogether. Or the true construction may be, that the plaintiff received a promise from the testator that, if he married, the testator would assist him at starting, on the faith of which he made his engagement to marry, and then the testator writes the letter referring to the former promise, and on the faith of that the plaintiff married. In either view there is a sufficient consideration to maintain this action. *England v. Davidson*, and *Kenaway v. Treleavan*.⁹ Till the marriage was executed there was a good continuing consideration to support the promise. *Warcop v. Morse*,¹⁰ *Payne v. Wilson*; *Roll. Abr. "Consideration,"* Q. 12; *Com. Dig.*, tit. *Action of Assumpsit* (B. 12). And when persons have been induced to change their position on the faith of a promise, the person promising is not allowed to say there was no consideration. *Pickard*

¹ 3 Bos. & P. 250.² 2 Campb. 317.³ 3 Man. & G. 842.⁴ 7 Mee. & W. 633.⁵ 8 Exch. 208.⁶ 1 Ad. & E. 57.⁷ 2 Com. B. Rep. 808.⁸ 7 E. & B. 503.⁹ 5 Mee. & W. 498.¹⁰ Cro. Eliz. 138.

v. Sears,¹ Crosbie v. M'Doual,² Montefiori v. Montefiori,³ Bold v. Hutchinson.⁴ As to the replication to the fifth plea, the plaintiff's continuance at the bar is not made a condition precedent. If it had been the intention of the testator to make it a condition precedent, he would have expressly so stipulated.

Bullar replied, and cited *Wain v. Warlters*,⁵ *Lampleigh v. Brathwait*, and *Thomas v. Thomas*.
Cur. adv. vult.

ERLE, C. J., now delivered the judgment of himself and KEATING, J. The question raised by the demurrer to the replication to the fourth plea is, whether there was a consideration to support the action on the promise to pay an annuity of 150*l.* per annum. If there be such a consideration, it is a marriage; therefore the promise is within the Statute of Frauds, and the consideration must appear in the writing containing the promise, that is, in the letter of the 11th of August, 1838, and in the surrounding circumstances to be gathered therefrom, together with the averments on the record. The circumstances are, that the plaintiff had made an engagement to marry Ellen Nicholl, his uncle promising him to assist him at starting, by which, as I understand the words, he meant on commencing his married life. Then the letter containing the promise declared on is said to specify what the assistance would be, namely, 150*l.* per annum during the uncle's life, and until the plaintiff's professional income should be acknowledged by him to exceed six hundred guineas; and a further averment, that the plaintiff, relying upon his promise, without any revocation on the part of the uncle, did marry Ellen Nicholl. Then, do these facts show that the promise was in consideration either of the loss to be sustained by the plaintiff, or the benefit to be derived from the plaintiff to the uncle, at his, the uncle's, request? My answer is in the affirmative. First, do these facts show a loss sustained by the plaintiff at the uncle's request? When I answer this in the affirmative, I am aware that a man's marriage with the woman of his choice is in one sense a boon, and in that sense the reverse of a loss; yet, as between the plaintiff and the party promising an income to support the marriage, it may be a loss. The plaintiff may have made the most material changes in his position, and have induced the object of his affections to do the same, and have incurred pecuniary liabilities resulting in embarrassment, which would be in every sense a loss, if the income which had been promised should be withheld; and if the promise was made in order to induce the parties to marry, the promise so made would be, in legal effect, a request to marry. Secondly, do these facts show a benefit derived from the plaintiff to the uncle, at his request? In answering again in the affirmative, I am at liberty to consider the relation in which the parties stood, and the interest in the *status* of the nephew which the uncle declares. The marriage primarily affects the parties thereto;

¹ 6 Ad. & E. 469.

² 13 Ves. 148.

³ 1 W. Bl. 363.

⁴ 20 Beav. 250.

⁵ 5 East, 10.

but in the second degree it may be an object of interest with a near relative, and in that sense a benefit to him. This benefit is also derived from the plaintiff at the uncle's request, if the promise of the annuity was intended as an inducement to the marriage; and the averment that the plaintiff, relying on the promise, married, is an averment that the promise was one inducement to the marriage. This is a consideration averred in the declaration, and it appears to me to be expressed in the letter, construed with the surrounding circumstances. No case bearing a strong analogy to the present was cited; but the importance of enforcing promises which have been made to induce parties to marry has been often recognized, and the cases of *Montefiori v. Montefiori* and *Bold v. Hutchinson* are examples. I do not feel it necessary to add any thing about the numerous authorities referred to in the learned arguments addressed to us, because the decision turns on a question of fact, whether the consideration for the promise is proved as pleaded. I think it is, and therefore my judgment on the first demurrer is for the plaintiff. The second demurrer raises the question, whether the plaintiff's continuing at the bar was made a condition precedent to the right to the annuity. I think not. The uncle promises to continue the annuity until the professional income exceeds the sum mentioned, and I find no stipulation that the annuity shall cease if the professional diligence ceases. My judgment on this demurrer is also for the plaintiff; and I should state that this is the judgment of my brother Keating and myself, my brother Byles differing with us.

BYLES, J. I am of opinion that the defendant is entitled to the judgment of the court on the demurrer to the second replication to the fourth plea. It is alleged by the fourth plea, that the defendant's testator never requested the plaintiff to enter into the engagement to marry, or to marry, and that there never was any consideration for the testator's promise, except what may be collected from the letter itself set out in the declaration. The inquiry, therefore, narrows itself to this question: Does the letter itself disclose any consideration for the promise? The consideration relied on by the plaintiff's counsel being the subsequent marriage of the plaintiff, I think the letter discloses no consideration. It is in these words: [His Lordship read it.] It is by no means clear that the words "at starting" mean "on marriage with Ellen Nicholl," or with any one else. The more natural meaning seems to me to be "at starting in the profession;" for it will be observed that these words are used by the testator in reciting a prior promise, made when the testator had not heard of the proposed marriage with Ellen Nicholl, or, so far as appears, heard of any proposed marriage. This construction is fortified by the consideration, that the annuity is not in terms made to begin from the marriage, but, as it should seem, from the date of the letter. Neither is it in terms made defeasible if Ellen Nicholl should die before marriage. But even on the assumption that the words "at starting" mean "on

marriage," I still think that no consideration appears sufficient to sustain the promise. The promise is one which by law must be in writing; and the fourth plea shows that no consideration or request, *dehors* the letter, existed, and therefore that no such consideration or request can be alluded to by the letter. Marriage of the plaintiff at the testator's express request would be, no doubt, an ample consideration; but marriage of the plaintiff without the testator's request is no consideration to the testator. It is true that marriage is, or may be, a detriment to the plaintiff, but detriment to the plaintiff is not enough, unless it either be a benefit to the testator, or be treated by the testator as such, by having been suffered at his request. Suppose a defendant to promise a plaintiff, "I will give you 500*l.* if you break your leg;" would that detriment to the plaintiff, should it happen, be any consideration? If it be said that such an accident is an involuntary mischief, would it have been a binding promise, if the testator had said, "I will give you 100*l.* a year while you continue in your present chambers?" I conceive that the promise would not be binding for want of a previous request by the testator. Now, the testator in the case before the court derived, so far as appears, no personal benefit from the marriage. The question, therefore, is still further narrowed to this point: Was the marriage at the testator's request? Express request there was none. Can any request be implied? The only words from which it can be contended that it is to be implied are the words, "I am glad to hear of your intended marriage with Ellen Nicholl." But it appears from the fourth plea, that that marriage had already been agreed on, and that the testator knew it. These words, therefore, seem to me to import no more than the satisfaction of the testator at the engagement as an accomplished fact. No request can, as it seems to me, be inferred from them. And further, how does it appear that the testator's implied request, if it could be implied, or his promise, if that promise alone would suffice, or both together, were intended to cause the marriage, or did cause it, so that the marriage can be said to have taken place at the testator's request, or, in other words, in consequence of that request? It seems to me, not only that this does not appear, but that the contrary appears; for the plaintiff, before the letter, had already bound himself to marry, by placing himself not only under a moral, but under a legal obligation to marry, and the testator knew it. The well-known cases which have been cited at the bar in support of the position, that a promise, based on the consideration of doing that which a man is already bound to do, is invalid, apply to this case; and it is not necessary, in order to invalidate the consideration, that the plaintiff's prior obligation to afford that consideration should have been an obligation to the defendant. It may have been an obligation to a third person: see *Herring v. Dorell* and *Atkinson v. Settree*. The reason why the doing what a man is already bound to do is no consideration, is not only because such a consideration is in judgment of law of no value, but because a man can hardly be allowed to say that the prior

legal obligation was not his determining motive. But, whether he can be allowed to say so or not, the plaintiff does not say so here. He does, indeed, make an attempt to meet this difficulty by alleging, in the replication to the fourth plea, that he married relying on the testator's promise; but he shrinks from alleging that, though he had promised to marry before the testator's promise to him, nevertheless he would have broken his engagement, and would not have married without the testator's promise. A man may rely on encouragements to the performance of his duty, who yet is prepared to do his duty without those encouragements. At the utmost, the allegation that he relied on the testator's promise seems to me to import no more than that he believed the testator would be as good as his word. It appears to me, for these reasons, that this letter is no more than a letter of kindness, creating no legal obligation. In their judgment on the other portions of the record, I agree with the rest of the Court.

Judgment for the plaintiff.

SCOTSON AND OTHERS v. PEGG.

IN THE EXCHEQUER, JANUARY 28, 1861.

[*Reported in 6 Hurlstone & Norman, 295.*]

DECLARATION. For that in consideration that the plaintiffs, at the request of the defendant, would deliver to the defendant a certain cargo of coals, then on board a certain ship of the plaintiffs, the defendant to take the same from and out of the said ship, the defendant promised the plaintiffs to unload and discharge the same at the rate of forty-nine tons of the said coals during each working day, after the said ship was ready to unload and discharge the same. And although the plaintiffs did afterwards deliver the said cargo to the defendant, and were always ready and willing to suffer and permit him to take the same from and out of the said ship as aforesaid, and although all things were done, and conditions precedent to be performed by the plaintiffs were performed by the plaintiffs, to entitle the plaintiffs to a performance of the said promise by the defendant, — yet the defendant did not unload and discharge the said cargo at the rate aforesaid during each working day after the said ship was ready to unload and discharge the same, and the defendant wholly neglected and refused so to do for five days longer and more than he ought to have done according to his said promise; and the plaintiffs were put to expense in and about the maintaining and keeping the master and crew of the said ship, &c.

Plea: That before the making of the said promise the plaintiffs, by

another contract made by and between the plaintiffs and certain other persons, agreed with the said certain other persons, for certain freight therefore payable by the said other persons to the plaintiffs, to carry the said coals on a certain voyage in the said ship, and to deliver the said coals to the order of the said other persons, which contract was in full force thence until and at the time of the making of the said promise and the delivery of said coals. And the defendant says that before the making of the said promise, and after the making of the said other contract, and while the last-mentioned contract was in force, he bought the coals of the said other persons, who thereupon ordered the plaintiffs to deliver the same to the defendant under and according to the said contract with the said other persons, of which the plaintiffs, before the making of the said promise, had notice. And the defendant says that the said order was in full force until and at the time of the making of the said promise, and thence until and at the delivery of the said coals, of which the plaintiffs always had notice. And the defendant says the then further delivery to the defendant of the said coals on the terms in the declaration mentioned, which was the consideration for the said promise, was the delivery of the said coals to the order of the said other persons, which the plaintiffs had by the said contract with such other persons so agreed to make as aforesaid, and which before and at the time of the making of the said promise, until and at the time of the said delivery, the plaintiffs were, by, under, and according to the said contract with the said other persons, bound to make as aforesaid. And the defendant says that there never was any consideration for his said promise other than the doing of that which by the said contract with the said other persons, they, the plaintiffs, before and at the time of the making of the said promise, and thence until the plaintiffs did it, were bound to do.

Demurrer and joinder.

Dowdeswell, in support of the demurrer. The plea is bad. It admits a promise by the defendant to unload the coal at the rate of forty-nine tons a day; and the delivery of the same by the plaintiffs is a sufficient consideration to support the promise. The defendant, having made an express promise, is not relieved from his obligation to perform it because the plaintiff has entered into a previous contract with another person to deliver to his order. The defence would be available under the general issue; but the plea was allowed on the authority of *Shadwell v. Shadwell*. This is an attempt to question the decisions on this subject, which have been uniform from the time of *Jesson v. Solly*.¹

The Court then called on

C. Pollock, to support the plea. There is no consideration to support the promise. The plea shows that the consideration alleged in the declaration is the doing that which the plaintiffs, by their contract with other persons, were bound to do. The charter-party only speci-

¹ 4 Taunt. 52.

fies the time and mode in which the cargo is to be discharged, as between the charterer and shipowner. [MARTIN, B. You must establish this, that, if a person says to another, "The goods which I have in my ship are yours; but I will not deliver them unless you pay my lien for freight," which the latter agrees to do, the delivery of the goods is no consideration to support the promise to pay.] The cargo is the property of the defendant, and the agreement to deliver to him that which he was entitled to have was a *nudum pactum*. In Black. Com. vol. ii. p. 450, it is said: "If a man buys his own goods in a fair or market, the contract of sale shall not bind him, so that he shall render the price, unless the property had been previously altered by a former sale." [WILDE, B. That is the case of a purchase of goods, the property in them being already in the purchaser; but here the plaintiffs will not deliver the cargo to the defendant, whereupon the defendant says, "If you will deliver it to me, I will discharge it in a certain manner."] The plaintiffs were under a prior legal obligation to deliver the cargo, and therefore the promise to the defendant to do the same thing was void. Where a plaintiff discharged one of two joint debtors, it was held that a promise by a third person to pay the debt, in order to obtain the discharge of the other debtor, was void for want of consideration. Herring v. Dorell. So, if A. be illegally arrested by B. for a debt, a promise by C. to pay the debt claimed by B. in consideration of B.'s releasing A. out of custody, is void. Atkinson v. Settree. [WILDE, B. In those cases there was a legal right to the performance of the very act which was bargained for: it is not so here. MARTIN, B. Suppose a man promised to marry on a certain day, and before that day arrived he refused, on the ground that his income was not sufficient, whereupon the father of the intended wife said to him: "If you will marry my daughter, I will allow you 1000*l.* a year." Could not the contract be enforced?] There would be no consideration for such a promise, the party being already under an obligation to marry. A promise by a captain to pay his sailors increased wages for performing their duty during a storm is void for want of consideration. [MARTIN, B. That proceeds on the ground of public policy. WILDE, B. It often happens that when goods arrive in a ship, and there is a lien upon them, a merchant who wants to get possession of the goods promises to pay the lien if the master will deliver them to him. A man may be bound by his contract to do a particular thing, but while it is doubtful whether or no he will do it, if a third person steps in and says, "I will pay you, if you will do it," the performance is a valid consideration for the payment. MARTIN, B. If a builder was under a contract to finish a house on a particular day, and the owner promised to pay him a sum of money if he would do it, what is to prevent the builder from recovering the money?] As the plaintiffs would be doing a wrong by not fulfilling their contract, it must be presumed that the prior legal obligation, and not the subsequent promise, was the motive for their delivery of the cargo.

MARTIN, B. I am of opinion that the plea is bad, both on principle and in law. It is bad in law because the ordinary rule is, that any act done whereby the contracting party receives a benefit is a good consideration for a promise by him. Here the benefit is the delivery of the coals to the defendant. It is consistent with the declaration that there may have been some dispute as to the defendant's right to have the coals, or it may be that the plaintiffs detained them for demurrage; in either case there would be good consideration that the plaintiffs, who were in possession of the coals, would allow the defendant to take them out of the ship. Then is it any answer that the plaintiffs had entered into a prior contract with other persons to deliver the coals to their order upon the same terms, and that the defendant was a stranger to that contract? In my opinion it is not. We must deal with this case as if no prior contract had been entered into. Suppose the plaintiffs had no chance of getting their money from the other persons, who might perhaps have become bankrupt. The defendant gets a benefit by the delivery of the coals to him, and it is immaterial that the plaintiffs had previously contracted with third parties to deliver to their order.

WILDE, B. I am also of opinion that the plaintiffs are entitled to judgment. The plaintiffs say, that in consideration that they would deliver to the defendant a cargo of coals from their ship, the defendant promised to discharge the cargo in a certain way. The defendant in answer says, "You made a previous contract with other persons that they should discharge the cargo in the same way, and therefore there is no consideration for my promise." But why is there no consideration? It is said, because the plaintiffs, in delivering the coals, are only performing that which they were already bound to do. But to say that there is no consideration is to say that it is not possible for one man to have an interest in the performance of a contract made by another. But if a person chooses to promise to pay a sum of money in order to induce another to perform that which he has already contracted with a third person to do, I confess I cannot see why such a promise should not be binding. Here the defendant, who was a stranger to the original contract, induced the plaintiffs to part with the cargo, which they might not otherwise have been willing to do, and the delivery of it to the defendant was a benefit to him. I accede to the proposition that, if a person contracts with another to do a certain thing, he cannot make the performance of it a consideration for a new promise to the same individual. But there is no authority for the proposition that where there has been a promise to one person to do a certain thing, it is not possible to make a valid promise to another to do the same thing. Therefore, deciding this matter on principle, it is plain to my mind that the delivery of the coals to the defendant was a good consideration for his promise, although the plaintiffs had made a previous contract to deliver them to the order of other persons.

Judgment for the plaintiffs.

SECTION V.

Forbearance.

WILLIAM BANES'S CASE.

IN THE EXCHEQUER CHAMBER, HILARY TERM, 1611.

[Reported in 9 Reports, 93 b.]

WILLIAM BANES brought an action on the case upon an assumpsit against Edward Paine and Mary his wife, and declared that, whereas William Havert was indebted to the plaintiff in 77l., which the plaintiff had lent him; and that the said William Havert made his will, and thereof made the said Mary executrix, and died, and that the said Mary took upon her the charge of the said will; and that she, being possessed, as executrix, of an interest of a term for divers years yet to come of certain gardens, and of a bowling-alley in Moorfields, in the parish of St. Leonard's, in Shoreditch, in the county of Middlesex, the said Mary, 28 Junii anno 7 Jac., perceiving that the said William Banes would sue her for non-payment of the said debt, in consideration that the said William Banes, at the request of the said Mary, *non molestaret aut sectaret eandem Mariam pro præd' 77l., sed deferre vellet solutionem inde usque festum Sti. Michaelis tunc proxim' sequen'*, assumed to pay the said debt at the said feast of St. Michael, or otherwise *eadem Maria adtunc et ibidem assignare vellet eidem Willielmo Banes pro securitate suâ in eâ parte pro solutione præd' 77l. totum interesse termini annorum præd', &c.*, in default of payment of the said 77l.; and averred that the plaintiff did not molest or sue her, &c., and that at the said feast the defendant did not pay or make assignment of the said interest; and afterwards the said Mary married the said Ed. Paine. The defendants pleaded *non assump'*, and it was found against them to the damages of 80l., &c. Upon which a general judgment was given against E. Paine and his wife, *sc.* that the plaintiff should recover against them his damages; upon which judgment the defendant brought a writ of error in the Exchequer Chamber by the statute of 27 El. c. 8. And the principal error assigned was, because the plaintiff had not averred that the executrix had assets in her hands, at the time of the assumpsit made, of the goods of the deceased, amounting to the value of the said debt; and if she had not assets, then it is *nudum pactum*, for there is no consideration to charge her, nor to bind her to her promise; and *eo potius* because she shall by this promise be charged generally, and not only of the goods of the deceased; and therefore, in regard the assumpsit charges herself, and transfers the charge of her as executor in another right to herself as for her proper debt, in respect of her promise, reason

requires that there ought to be some good consideration thereof, which cannot be if she has not assets.

But it was resolved by all the Justices of the Common Pleas and Barons of the Exchequer, that the declaration was good enough, for it shall be intended *prima facie* that she had assets; and therefore, in debt against executor, or against the heir, the plaintiff shall never aver in his declaration that they have assets, for the law presumes that *prima facie*; for the law presumes that the testator or the ancestor would not leave a greater charge upon his executor or heir than he leaves benefit to discharge it. And the consideration in the case at bar is good; for it is as much as if a stranger had said to the plaintiff, forbear your debt, and do not sue the defendant till Michaelmas, and at the said feast I will pay you your debt; that is a good consideration, although it cannot be any benefit to him who makes the promise; yet because it is a damage to the creditor to forbear his suit and duty, it is a good consideration; and as in the same case he who makes the promise for another shall be charged generally upon his own promise, so when one is executor, and makes such a promise, the debt is due by him in right of his executorship, and the promise is made in his own right; and therefore without question he shall be charged in an action brought upon his promise generally, and yet the money which he pays in satisfaction of the debt of the testator shall be allowed him as parcel of his account as executor; for his promise extends to pay the debt with which he was chargeable as executor; but I conceive, if the truth of the case be that in the case at bar there had not been any debt, or if there had been a debt, and the executrix had nothing in her hands at the time of the promise, she might have given it in evidence, and thereupon have been helped, for then in truth there was not any consideration; for to forbear the debt where none was, or with which she was not chargeable, is not any benefit to the defendant nor damage to the plaintiff. Also the case at bar was stronger, because the defendant promised either to pay the money or to assign the interest of the lease which she had as executrix, for it was in her election to do which of them she would. And so note the principal point resolved by both Courts.

BIDWELL v. CATTON.

HILARY TERM, '1618.

[Reported in *Hobart*, 216.]

BIDWELL, an attorney, brought an action of the case against Catton, executor of Reve, and counted that, whereas he had in Michaelmas Term, 14 Jac., prosecuted an attachment of privilege against Reve the

testator, returnable in Hil. Term, the testator knowing of it, in consideration that, at his request, the plaintiff would forbear to prosecute the said writ any further against the said testator, the testator did promise to pay him 50*l.*, and then avers, &c. And after a verdict it was excepted in arrest of judgment:

First, that it was not alleged that the plaintiff had any just cause of action.

Secondly, that this action still remains. . . .

But the Court nevertheless gave judgment: For first, suits are not presumed causeless, and the promise argues cause, in that he desired to stay off the suit. *Quære*, if the defendant had averred that there was no cause of suit.

Secondly, though this did not require a discharge of the action, yet it requires a loss of the writ, and a delay of the suit, which was both benefit to the one, and loss to the other. . . .

FORTH AND OTHERS v. STANTON, WIDOW.

IN THE KING'S BENCH, HILARY TERM, 1669.

[Reported in 1 *Williams' Saunders*, 210.]

ASSUMPSIT. The plaintiffs declare that one Robert Stanton, the late husband of the defendant, was indebted to John Neve and Timothy Alsopp in 100*l.* for beer sold by them to him, and, being so indebted, the said Robert Stanton died; after whose death the defendant took into her hands goods and chattels of the said Robert Stanton of the value of 100*l.*, and administered those goods and chattels as executor of the will of the said Robert; and that afterwards the defendant had paid 40*l.*, parcel of the said 100*l.*, to the said Neve and Alsopp. And whereas the said Neve and Alsopp afterwards had assigned to and appointed the plaintiffs to receive of the defendant 60*l.*, residue of the said 100*l.*, to the proper use of the plaintiffs, whereof the defendant had notice given to her: whereupon the defendant, in consideration that the plaintiffs, at the special instance and request of the defendant, would accept the defendant to be their debtor for the said 60*l.*, undertook and promised the plaintiffs to pay them the said 60*l.* And the plaintiffs aver that they had accepted the said defendant to be their debtor. And they also declare upon an *insimul computasset* for 60*l.* more. Yet the said defendant had not paid the several sums, to the damage of the plaintiffs.

The defendant as to the *insimul computasset* pleaded *non assumpsit*. and upon the issue tried a verdict was found for the defendant. And as to the said special promise, the defendant pleaded in bar, that the plaintiffs did not show her any writing or deed, whereby the said Neve

and Alsopp had assigned to them, or appointed them to receive, the said 60*l.* to their own use; and this she is ready to verify, &c.: upon which the plaintiffs demurred in law.

And now after verdict for the defendant, the plaintiffs moved the matter in law upon the defendant's special plea, which was agreed by all to be bad; but the defendant's counsel insisted that the declaration was insufficient, because here is no sufficient consideration to found the promise. For the defendant before the promise did not owe any thing to the plaintiffs, but to Neve and Alsopp; and by their assignment they did not transfer any property or interest in the debt, being a *chose in action*, but only gave an authority to the plaintiffs to receive it, if the defendant would pay it. But if the defendant will not pay it, the plaintiffs cannot bring any action against her, but Neve and Alsopp must sue for it. It is true, indeed, that, if the defendant had paid the 60*l.* to the plaintiffs, she would be discharged against the said Neve and Alsopp; but in this case the defendant refused to pay; therefore Neve and Alsopp ought to bring the action against her, and not the plaintiffs, who have not any interest in the debt. And this case is no more than if I promise a stranger, to whom I do not owe any thing, that if he will accept me to be his debtor for 60*l.* I will pay it to him; yet this is but a *nudum pactum*, because I was not indebted to him before. And my promise to pay, if the other will receive it, is nothing but a mere voluntary promise, which does not bind me at all. And in the present case, if the promise should be good, the defendant would be charged *de bonis propriis*, where she was chargeable to Neve and Alsopp only *de bonis testatoris*; and yet here is no consideration at all so to charge her; and of this opinion was the whole Court. And judgment at the prayer of the plaintiff's counsel was given for the defendant, that plaintiffs should take nothing by their bill. *Jones* for the plaintiffs. *Saunders* for the defendant.

BARBER v. FOX.

IN THE KING'S BENCH, TRINITY TERM, 1670.

[Reported in 2 *Williams' Saunders*, 136.]

ASSUMPSIT. That whereas one Anthony Fox, the father of the defendant, by his writing obligatory became bound to the plaintiff in 92*l.* 12*s.* upon condition to pay him 51*l.* 16*s.* at a certain day past, which was not paid, and so the obligation became forfeited; and afterward Anthony Fox the father died, and the defendant was his son and heir, wherefore the plaintiff intended to sue the defendant as son and heir on the said bond; and the defendant having notice of it, in consideration that the plaintiff at the special instance and request of

the defendant would forbear his intended suit against the defendant as son and heir on the said bond, undertook and promised the plaintiff to pay him the said 5*l.* 16*s.* on request; and the plaintiff averred forbearance, and yet the defendant had not paid the said money, although on such a day and year he was requested, &c., to the damage of the plaintiff, &c. On *non assumpsit* pleaded, a verdict was found for the plaintiff.

And now *Weston* moved in arrest of judgment, that here was no consideration; for it does not appear that the defendant was suable upon this bond as son and heir; for it is not shown that Anthony Fox, the defendant's ancestor, whose son and heir he is, had bound himself and his heirs by the said bond; and if the heir is not bound expressly by name, he is not bound at all, and therefore here was no consideration to found this promise. Wherefore judgment was stayed until it should be moved on the other side.

And afterwards *Saunders* for the plaintiff moved for judgment, and said that though the declaration would have been bad on demurrer, yet it is now made good by the verdict; for the jury have found that the defendant was bound as heir in the said bond, for otherwise there was no consideration; and they ought to have found that the defendant did not undertake, &c., if there was no consideration, or otherwise they may be attainted for a false verdict; but they having found that the defendant did undertake and promise as the plaintiff has declared, it ought of necessity now to be intended that Anthony Fox had bound himself and his heirs by the said bond.

Sed non allocatur; for by the Court, though they would intend a personal lien against an executor, if he has assets in his hands, though it be not averred, yet they will not intend a real lien against an heir, though he be bound by the bond of his ancestor, unless it is expressly alleged; and therefore they would not intend it here, though it be after verdict. Wherefore judgment was arrested; *quod nota*.

LOYD v. LEE.

BEFORE PRATT, C. J., AT NISI PRIUS, 1718.

[Reported in 1 *Strange*, 94.]

A MARRIED woman gives a promissory note as a *feme sole*; and after her husband's death, in consideration of forbearance, promises to pay it. And now, in an action against her, it was insisted that, though, she being under coverture at the time of giving the note, it was voidable for that reason, yet by her subsequent promise, when she was of ability to make a promise, she had made herself liable, and the forbearance was a new consideration. But the C. J. held the contrary, and that

the note was not barely voidable, but absolutely void ; and forbearance, where originally there is no cause of action, is no consideration to raise an assumpsit. But he said it might be otherwise where the contract was but voidable. And so the plaintiff was called.

ANONYMOUS.

IN THE KING'S BENCH, JUNE 16, 1774.

[*Reported in Cowper, 128.*]

UPON a rule to show cause why, upon filing common bail, a *superseas* should not issue as to this action to discharge the defendant out of gaol, Mr. *Cowper* showed for cause that though the debt was originally under 10*l.*, yet, after judgment obtained and costs taxed, the whole sum amounted to 17*l.* ; and that upon a writ of execution being sued out, the defendant, in consideration that the plaintiff would stay the execution at that time, undertook and promised to pay the debt and costs ; that several applications had been since made to the defendant for payment without effect, and therefore he was now held to bail upon his new assumpsit for the 17*l.* . . .

LORD MANSFIELD. This is a new species of action, and an attempt to turn a judgment debt into a debt upon simple contract. If the undertaking had been by a third person in consequence of the forbearance, it would have been a good ground of assumpsit against such third person. But here the promise is by the defendant himself to pay a debt to which he was before liable upon record ; for by the judgment he is liable to the costs as well as the debt. And therefore I am of opinion that such promise is no ground upon which to raise an assumpsit.

ASHHURST, J. I am of the same opinion. This promise is no waiver or extinguishment of the judgment debt ; but it still remains a lien upon the land. *Rule made absolute.*¹

JONES v. ASHBURNHAM AND NANCY, HIS WIFE.

IN THE KING'S BENCH, JANUARY 31, 1804.

[*Reported in 4 East, 455.*]

THE plaintiff declared that, whereas one S. F. Bancroft, since deceased, at the time of his death was indebted to him in 58*l.* for

¹ See *Runnamaker v. Cordray*, 54 Ill. 303 ; *Leland v. Barry*, 69 Ill. 348. — ED.

goods before that time sold and delivered to the deceased, whereof the defendant Nancy had notice; and thereupon, after the death of Bancroft, the defendant Nancy, before her intermarriage with the other defendant, Ashburnham, in consideration of the premises, and also in consideration that the plaintiff, at the special instance and request of the defendant Nancy, would forbear and give day of payment of the said 58*l.* as aftermentioned, she the said Nancy, by a note in writing signed by her according to the form of the statute, &c., on the 20th of March, 1801, undertook and promised the plaintiff to discharge the said debt so due and owing to him in a reasonable time, and to send him 20*l.* in part payment in the July following; and although the same July is long since passed, during which the said Nancy continued sole, and a reasonable time elapsed for the payment of the whole 58*l.*, according to the tenor and effect of the said promise; and though the plaintiff has always, from the time of making the said promise, hitherto forborne and given day of payment of the said debt, whereof the defendant Nancy before her intermarriage, and both the defendants since their intermarriage, have had due notice, yet the defendants have respectively, &c., refused to pay, &c. There were other counts in substance the same; one alleging the forbearance to be till July, &c. To all which there was a demurrer, assigning for special causes that it is not alleged in the declaration from whom the said sum of 58*l.* therein mentioned was due and owing to the plaintiff at the time when the defendant Nancy is supposed to have made the promise and undertaking mentioned, or that any persons or person were or was then liable to pay the plaintiff that sum; and that it is not alleged to whom the plaintiff hath forborne and given day of payment of the said 58*l.*; and that the declaration does not disclose any legal and sufficient consideration for the supposed promise; nor does it thereby appear that the plaintiff has any good cause of action against the defendants, &c.

Marryat, in support of the demurrer. This is a promise made by a stranger to the original contract or consideration for the supposed forbearance. But a promise to forbear generally is not a sufficient foundation for an assumpsit, without showing a person who was liable to pay the debt. If the promise had been laid barely for forbearing to sue the defendant, it not appearing that she was before liable for any debt to the plaintiff, the action could not have been sustained: then it cannot aid the plaint that a debt is stated to be due to the plaintiff, without stating any person from whom he could have enforced payment. It is not enough that there may be some person liable to him *in rerum naturâ* who is unknown. All the cases upon the subject are collected in 1 Com. Dig. 160, Action upon the Case upon Assumpsit (F. 8) which show that no action can be maintained upon an assumpsit in consideration of forbearance where the party was not chargeable; as in the case of an heir who has no assets. This case is not distinguishable in principle from those. To sustain such an action the plaintiff must show

that he was in a situation to forbear some person whom he might have sued, whom it would have been beneficial to him to have sued, and consequently whom it was detrimental for him to forbear suing. Here it is not shown that any person was liable to the plaintiff at the time of the promise made; for the original debtor was dead, and no representation was taken out, nor, for aught appears, any assets, nor any suit surceased in consequence of the promise which the plaintiff could have supported. In *Smith v. Jones*¹ the plaintiff declared that his father bequeathed him a legacy of 7*l.*, and made C. his executrix, and died, and that the defendant intermarried with C.; and that, in consideration that assets of the plaintiff's father came into the hands of the defendant, and in consideration that the plaintiff would forbear² the 7*l.* till All-Saints following, the defendant promised to pay it at that time; and then the plaintiff showed that he had forborne, &c., till the day, yet the defendant had not paid him. The defendant pleaded that C., the executrix of the father, died intestate at such a place before the promise made: upon which the plaintiff demurred; and judgment was given against him: for, by the death of the executrix before the promise, it appeared that there was not any consideration sufficient to charge the defendant, who was not chargeable with the legacy after the death of his wife, the executrix. The report states further, that the declaration was also holden ill "because it did not show precisely what person the plaintiff was to forbear to sue for the 7*l.*; for it could not be intended that he should forbear the defendant, who it appeared by law was not chargeable with it." So in *Rosyer v. Langdale*³ the plaintiff declared against a *feme* administratrix that she, in consideration that he would forbear suit until she had taken out letters of administration, promised to pay him a certain sum owing to him by her intestate. And after verdict and judgment, error was brought; for that the plaintiff had set forth no consideration for the assumpsit; for till administration taken out by the defendant she was not liable to be sued, except there were a cause depending, which there was not. And this was holden to be a good exception. The subsequent case indeed of *Hume v. Hinton*⁴ may seem to contradict that, where it was holden that a general forbearance of the debt was in effect a forbearance to sue all the world, and was sufficient to uphold an assumpsit, without showing that any particular person was liable to pay; but that, it is to be observed, was after verdict, when it might be presumed that some person was shown to be liable. And further, it is said to have been decided upon the authority of a case of *Hill v. Bailey*, overruling that of *Smith v. Jones*. But in *Hill v. Bailey*, which is reported in 1 Rol. Abr. 22,⁵ there was an averment that the goods of the plaintiff's

¹ Yelv. 184.

² *i. e.* forbear to sue the defendant for the 7*l.*, according to the report of the s. o. in Cro. Jac. 257.

³ Sty. 248, and *vide* *Hayward v. Duckett*, *ib.* 405.

⁴ Sty. 304.

⁵ And *vide* 1 Danv. Abr. 50.

debtor came *legitimo modo* after his death to the defendant, who, in consideration that the plaintiff would forbear his debt, promised to pay it. There was therefore a good consideration for the promise to forbear generally. And in *Reynolds v. Prosser*,¹ Hardres, in argument, cites the same case of *Hume v. Hinton* (under the name of *Hummers v. Hunton*), as having been adjudged to be no consideration to sustain the promise. There is another case which may be cited for the plaintiff, of *Quick v. Copleton*,² where the defendant's late husband being indebted to the plaintiff, and the defendant about to come to London, and in fear of being arrested by the plaintiff, she promised to pay him, in consideration that he would not trouble her and would forbear till Michaelmas. And after verdict, it was moved in arrest of judgment, that, she not being shown to be executrix or administratrix, her forbearance was not any consideration; which was agreed by the Court: but they held that the subsequent words, "forbear till Michaelmas," were general, not only to forbear her but all others, and made a good consideration. But the opinion afterwards delivered by Hyde, C. J., very much shakes the authority of this case: for he says that a forbearance to sue one who fears to be sued is a good consideration; which certainly cannot be maintained: and he cited a case in C. B. when he sat there, where a woman, who feared that the dead body of her son would be arrested for debt, was holden liable upon a promise to pay in consideration of forbearance, though she was neither executrix nor administratrix. But of this the other judges are said to have doubted. [LORD ELLENBOROUGH, C. J. It is impossible to contend that this last forbearance could be a good consideration for an assumpsit; for to seize a dead body upon any such pretence would be *contra bonos mores*, and an extortion upon the relatives.] The weight, then, of the authorities is with the defendant, as the principle clearly is with him. For as, where the forbearance is stated to be of the defendant himself, the plaintiff must show that he was before liable to be sued; so when the forbearance is general, of all the world, it is equally reasonable that the plaintiff should show some one person who was liable to him: for the forbearance of a groundless suit has been holden to be no consideration for an assumpsit, as in *Tooley v. Windham*³ and *Lloyd v. Lee*. Here the defendant is not shown to be executrix or administratrix, or to have assets; and a promise even by an executor, as such, is a mere *nudum pactum* without assets at the time.⁴

Jervis, contra. The consideration of general forbearance, as here laid, is sufficient to maintain the assumpsit. To sustain a promise, the consideration must either be beneficial to the defendant or detrimental to the plaintiff. In *Pillans v. Van Mierop*,⁴ Yates, J., says: "Any damage to another, or suspension or forbearance of his right, is a foundation for an undertaking and will make it binding, though no actual benefit

¹ Hardr. 73.

³ Cro. Eliz. 206.

² 1 Lev. 161, 1 Sid. 242, and 1 Keb. 866.

⁴ *Rann v. Hughes*, 7 Term Rep. 350, note (a).

accrue to the party undertaking." He adds, that there "the promise and undertaking of the defendants did occasion a possibility of loss to the plaintiffs." It is part of the definition that there must be a right in the plaintiff; which furnishes an answer to the cases of *Tooley v. Windham and Lloyd v. Lee*, where no such right appeared. Now here the plaintiff shows a debt due, and a right to recover, though not against any person named; but it is enough that he shows a possibility of loss by the forbearance. [LORD ELLENBOROUGH, C. J. It is not entitled to the name of forbearance unless you show something or somebody to be forborne. If there be a right which can be enforced against anybody, no doubt that a promise to forbear is a good consideration; but if there be no person liable, how is it entitled to the name or quality of forbearance?] The cases show that it is sufficient if there be a right in the plaintiff which is forborne, though not shown to be capable of being enforced at the time against any particular person; as in *Quick v. Copleton*, where the consideration relied on by the Court was not the fear of being sued, but the general forbearance, "to forbear till Michaelmas." And yet it was not averred there that either the defendant or any other person was executrix, &c., of the deceased debtor; and consequently no person appeared to be liable to the plaintiff at the time. So in the case of *Hill v. Bailey*, in 1 Rol. Abr. 22, the consideration relied on was not that the goods of the deceased debtor came to the defendant's hands *legitimo modo*, for then there was no occasion to lay any forbearance; but the judgment turned on the sufficiency of the general forbearance to sue, to sustain the assumpsit. [LAWRENCE, J. The promise to forbear goes further than the lawful possession of assets; for it makes the defendant liable to judgment *de bonis propriis*, and not merely as far as the assets go.] Then the case of *Hume v. Hinton* is in point (which is merely misquoted by Hardres in argument); and that was subsequent to *Smith v. Jones*,¹ which, it appears from all the reports of it taken together, was a promise not for forbearance generally but to forbear the defendant, which reconciles the authorities; and the same answer will apply to *Rosyer v. Langdale*, which was a promise in consideration that the plaintiff would forbear suit until the defendant had taken out administration; which was taken to mean a forbearance to sue the defendant. But where a person is sued as executor, which was the case in *Rann v. Hughes*, his liability on a promise to pay can only be coëxtensive with his original liability in respect of assets.

Marryat, in reply, was stopped by the Court.

LORD ELLENBOROUGH, C. J. The way in which I am disposed to consider this case will break in upon no recognized rule of law, nor on the plain sense of what was laid down by Mr. Justice Yates in the case of *Pillans v. Van Mierop*. It is a known rule of law, that to make a promise obligatory there must be some benefit to the party making it,

¹ Yelv. 184, Cro. Jac. 257, Owen, 133.

or some detriment to the party to whom it is made; otherwise it is considered as *nudum pactum* and cannot be enforced. I do not say that the opinion which I have formed will not break in on any of the cases which have been cited, but it entrenches on no general rule; and in order to show that, I will examine the rule referred to as laid down by Mr. Justice Yates, and see how it applies to the present case. He says that "any damage to another, or suspension or forbearance of his right, is a foundation for an undertaking," &c. Now how does the plaintiff show any damage to himself by forbearing to sue, when there was no fund which could be the object of suit; where it does not appear that any person *in rerum naturâ* was liable to be sued by him? No right can exist in this vague, abstract, and indefinite way. Right is a correlative term: there must be some object of right, some object of suit, some party who, in respect of some fund or some character known in the law, is liable; otherwise there cannot be said to be any right. Has there been then any suspension of the plaintiff's right? Now unless a right is capable of being exercised, unless it can be put in force, there can be no suspension of it. And that it could have been exercised or put in force but for the promise made by the defendant, is not shown. Then what forbearance is shown? It must be a forbearance of a right which may be enforced with effect. It is true that a promise may be binding though there may be no actual benefit resulting to the party making it, because it is enough if the plaintiff may be damaged by it; but it does not appear here that the forbearance could produce any detriment to the plaintiff. It does not therefore appear that Mr. Justice Yates laid down any doctrine which does not square with the general received rule of law, that to sustain a promise there must be a benefit on the one hand or a detriment on the other. But here, whether there were any representative or any funds of the original debtor does not appear. Then, as to the cases cited, that of *Rosyer v. Langdale* is strong to the purpose; for it was there decided that a promise, in consideration that the plaintiff would forbear suit until the defendant had taken out letters of administration, was without foundation, because it did not appear that the party was liable before administration taken out. And this was rightly determined; for forbearance of an unfounded suit is no forbearance. But this case is attempted to be met by that of *Hume v. Hinton* in the same book, where a promise by the mother of an intestate indebted to the plaintiff, that if he would stay for the money till a given day she would pay it, was sustained. That, however, was after verdict; and that is material to be attended to, because it might be presumed to have been proved that the defendant had so intermeddled with the intestate's effects as to make herself liable as executrix *de son tort*, and had funds of the deceased in her hands for which, but for the promise made, she might have been sued in that character. But no such intendment can be made here. The case of *Quick v. Copleton* is also relied on. That, too, was after verdict; and it was moved in arrest of judgment for want of consideration. I think

that even after verdict that declaration would be bad, being vicious on the face of it. It is stated that the defendant's late husband was indebted to the plaintiff, and that she (not stating her to be clothed with any representative character), about to come to London, and being in fear to be arrested by the plaintiff, promised, &c. Now an attempt to impose upon a person an unlawful terror (and the threatening of an unlawful suit is as bad) can never be a good consideration for a promise to pay; yet that ground is insisted on by the Chief Justice. And as to the case there cited by him, of a mother who promised to pay on forbearance of the plaintiff to arrest the dead body of her son, which she feared he was about to do, it is contrary to every principle of law and moral feeling. Such an act is revolting to humanity, and illegal; and therefore any promise extorted by the fear of it could never be valid in law. It might as well be said that a promise, in consideration that one would withdraw a pistol from another's breast, could be enforced against the party acting under such unlawful terror. Here, there being no consideration of benefit to the defendant, or of detriment or possibility of detriment to the plaintiff, shown by him on the face of the declaration, and this coming on upon demurrer, where nothing can be intended as it may after verdict, I am clearly of opinion that the declaration is bad.

GROSE, J. It must be admitted that, if a consideration for the promise do not sufficiently appear upon the face of the declaration, it cannot be supported. There is a great difference between questions of this sort, arising upon demurrer to the declaration, and in arrest of judgment after verdict; in which latter case every thing is to be intended which can be in favor of the verdict: but not so on demurrer. It is however said that a detriment to the plaintiff will support an assumpsit as well as a benefit to the defendant, and that here the plaintiff alleges a forbearance. But it is a perversion of terms to call that a forbearance to sue, if there were no person who was capable of being sued; and here none is shown. There can be no forbearance in such a case; and therefore there is an end of the consideration. This is too plain to require any thing further to be said upon it, and makes it unnecessary, after what my Lord has said, to enter into the consideration of the cases.

LAWRENCE, J. This question arises upon a special demurrer, which points out an objection to the declaration, that no person is stated who was liable to be sued at the time of the promise made, in respect to whom the plaintiff can be said to have forbore suit. And on this ground the case is distinguishable from those relied on by the plaintiff's counsel, which were after verdict; and in support of which it might be said that when the jury found that the plaintiff did forbear to sue, they must be presumed to have found, upon proof laid before them, that there was somebody who could have been sued. But no such intendment can be made upon demurrer. The argument proceeds upon a fallacy, in supposing that some person must exist liable to the

plaintiff's suit, to forbear whom must consequently be a disadvantage to him, and a consideration for the defendant's promise. But that is not so. The deceased might leave no assets, and there might be no administration to him taken out: there would then be no person to sue. So he might be a bastard, and have no legal representatives entitled to take out administration of his effects, in which case the crown would be entitled to them; and still there would be nobody to be sued. It is not therefore true that there must be somebody liable to whom a forbearance to sue may refer. And I agree with the argument of the defendant's counsel that, if it be no consideration for the promise to forbear to sue the defendant, without showing that the defendant was before liable to have been sued, it can be no consideration for a promise to forbear to sue all the world generally, without showing that some person or other was liable to be sued: for without that, the plaintiff does not show any detriment arising to him from the forbearance of his suit. The principle is admitted that the plaintiff must show some benefit to the defendant or some detriment to himself. And I understand Mr. Justice Yates, in illustrating that principle in the passage cited, to say that where it appears on the face of the declaration that there is somebody whom the plaintiff may sue, it is not necessary to show that he would be benefited by suing him; it is sufficient that there is some person whom he might sue, and from whom he might obtain satisfaction.

LE BLANC, J. The definition by Mr. Justice Yates of a consideration sufficient to maintain a promise is, that it be either of some benefit to the defendant or some detriment to the plaintiff. It is sufficient if it be a detriment to the plaintiff, though no actual benefit accrue to the party undertaking. So far only the definition goes. Afterwards indeed, in commenting on that definition, he says that the promise of the defendant did occasion a possibility of loss to the plaintiffs. They might, he says, have been thereby prevented from resorting to the original debtor, or getting further security from him. But all this latter part is only a comment on the definition, and showing how the case then in judgment applied to it. But I do not take it to be any part of the definition itself intended to be laid down by him, that if any person stated that he had forborne suing on a cause of action which might (or might not) by possibility occasion a loss to him, that was a sufficient ground for an undertaking by another to pay him. Now here the plaintiff endeavors to make out a detriment to himself by showing that one deceased was indebted to him; and that, in consideration that he would forbear and give day of payment, the defendant promised, &c. But it does not follow of course from thence that any detriment arose to the plaintiff from his forbearance, if it do not appear that there was any person whom he could have sued. And the general current of authorities shows that it is not sufficient to state a consideration to forbear generally, unless it be also shown that there was some person to be forborne. Now here the declaration does not

state that there was any representative of the debtor, or that any person had taken out administration to him, or that any person was going to administer to the effects and to satisfy the plaintiff's debt, but was prevented from so doing by the undertaking of the defendant. There therefore appears to be a want of consideration to sustain the promise.

*Judgment for the defendant.*¹

PAYNE v. WILSON, ONE, &c.

IN THE KING'S BENCH, NOVEMBER 15, 1827.

[Reported in 7 Barnewall & Creswell, 423.]

ASSUMPSIT. The declaration stated that, at the time of making the promise of the defendant thereafter mentioned, one C. Vaux was indebted to the plaintiff in 103*l.* 8*s.*, for the recovery of which the plaintiff had commenced an action against C. Vaux in K. B., and in which action C. Vaux had signed a *cognovit* for the payment of the said debt of 103*l.* 8*s.*, together with the costs of the said action, at certain times therein mentioned, to wit, at, &c.; that before the making of the promise of the defendant, C. Vaux having made default in payment of the whole of the sum of 103*l.* 8*s.* at the time specified in the *cognovit*, he the plaintiff was about to take proceedings on the *cognovit*; and thereupon, to wit, on, &c., at, &c., in consideration that the plaintiff, at the request of the defendant, would consent to suspend proceedings against C. Vaux on the *cognovit* so signed by him, he the defendant undertook and promised the plaintiff to pay to him, the plaintiff, 30*l.* on account of the said debt on the 1st of April then next, and a further sum at a subsequent day. Averment: that the plaintiff did suspend all further proceedings against the said C. Vaux on the *cognovit*, of which the defendant had notice. Breach: non-payment of the 30*l.* Plea: the general issue. At the trial before Lord Tenterden, C.J., at the Middlesex Sittings after Hilary Term, 1827, the plaintiff produced in evidence the following paper, signed by the defendant: "Mr. R. Payne having, at my instance and request, consented to suspend proceedings against the above named defendant on the *cognovit* signed by him in this cause, and given for payment of the debt this day, I do hereby, in consideration thereof, personally undertake and promise to pay to the plaintiff the sum of 30*l.* on account of the said debt, on the first day of April now next; and the further sum of 53*l.* 3*s.* within four months next ensuing the first day of April." It was objected, on the part of the defendant, that there was a variance between the contract proved and that alleged in the declaration; the consideration for the promise stated in the declaration being

¹ See *Nelson v. Serle*, 4 M. & W. 795. — ED.

executory, whereas the consideration proved had been executed. Lord Tenterden, C. J., directed the jury to find a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit. Campbell, in Easter Term, obtained a rule *nisi*, first, for entering a nonsuit on the objection taken at the trial; and, secondly, for arresting the judgment, on the ground that no sufficient consideration for the promise was stated in the declaration, it not being alleged that the plaintiff had consented to forbear to sue for any definite time; and also that it was not properly averred that the consideration was performed.

The *Attorney General*¹ and *Wightman* now showed cause. There was sufficient proof of the executory consideration stated in the declaration. The proof was that, in consideration of the plaintiff's having, at the request of the defendant, consented to suspend proceedings against Vaux, the defendant promised. Now that implies that the defendant's request to suspend the proceedings preceded the consent given by the plaintiff, and therefore this was evidence of a promise made by the defendant in consideration that the plaintiff would suspend proceedings.

Campbell, contra. The consideration proved in this case was executed, the consideration alleged was executory. There is a material distinction between considerations executory and executed. Executory considerations are traversable, and performance must be averred with time and place. It depends on the performance of the consideration, whether the promise be binding. If the consideration be executed, the promise is immediately binding; there is no condition or qualification. Here the consideration alleged in the declaration was executory, and it would depend upon the plaintiff's consent to suspend the proceedings, whether the defendant's promise were binding. In the contract proved, the consideration was executed. No subsequent consent of the plaintiff was necessary to make the defendant liable. But no sufficient consideration appears in the contract itself, nor is alleged in the declaration; for a forbearance to sue is a good consideration for a promise, only where it is absolute, *Mapes v. Sidney*; ² or for a definite portion of time, *Fisher v. Richardson*; ³ or a reasonable time, *Johnson v. Whitchcott*: ⁴ forbearance for a little ⁵ or some time ⁶ is not sufficient. And even supposing this could be considered as a contract to suspend proceedings for some definite period,

¹ Sir James Scarlett. — ED.

² Cro. Jac. 683.

³ Cro. Jac. 47.

⁴ 1 Rol. Abr. 24, pl. 33.

⁵ 1 Rol. Abr. 23, pl. 25. ["If A. be indebted to B. in 20*l.*, and B. says to A. that he will sue him for the debt, whereupon A. says to him that, if he will forbear him *per paululum tempus*, he will pay him, this is not a good consideration for an assumpsit, because he could sue him immediately." — ED.]

⁶ 1 Rol. Abr. 23, pl. 26. ["If A. promise B., in consideration that he will forbear to sue him for a certain debt *pro aliquo tempore*, that he will pay him, and it is averred that he forbore him for a year, this is not a good consideration, for *aliquod tempus* is at least as little as *paululum tempus*." — ED.]

it is not alleged that the plaintiff did suspend his proceedings absolutely, or for any definite period of time.

LORD TENTERDEN, C. J. I think that the contract stated in the declaration was sufficiently proved by the paper produced in evidence; for it must be implied, from the contents of the paper, that the defendant's promise was made in consideration that the plaintiff would suspend his proceedings against Vaux. It states that the plaintiff had consented to do so at the request of the defendant. That request, therefore, must have preceded and induced the consent given to suspend the proceedings. Then, as to the objections in arrest of judgment, it is said that it does not appear that the plaintiff consented to suspend the proceedings for any definite time. The promise made by the defendant was to pay 30*l.* on the 1st of April, in consideration of the plaintiff's consenting to suspend proceedings. That imports that the proceedings were, at all events, to be suspended until that period; and I think that the averment that the plaintiff did suspend the proceedings is sufficient after verdict, because it must be taken that it was proved at the trial that the plaintiff had suspended the proceedings, either for a time required by law, or for a definite or reasonable time.

BAYLEY, J. I think there was no variance in this case. The declaration states that, in consideration that the plaintiff would consent to suspend the proceedings, the defendant promised. Now I think that the fair meaning of that is, "in consideration that he would suspend proceedings, the defendant promised;" and I think that is proved by the paper produced in evidence. I think also that it must be taken, after verdict, that the agreement was to suspend until the 1st of April, and also that the allegation that he did suspend is sufficient.

LITLEDALE, J. I am of the same opinion. There is a clear distinction between considerations executed and executory. In Com. Dig., tit. Action on the Case upon Assumpsit (B. 12), it is laid down that "an assumpsit lies, though the consideration be executed in part, as in consideration that he had done a thing at my request;" and afterwards it is laid down, "so, if the consideration is continuing, though the act be executed, as in consideration that the lessee now in possession had paid his rent very well, to save him harmless; for prompt payment of the rent is a continuing consideration when he remains in possession." In the present case there was a continuing consideration, for the plaintiff not only had consented to suspend the proceedings, but that they should be suspended until the 1st of April (until the instalments became due). Therefore, this might be alleged in pleading either as an executed or executory consideration; and it was, therefore, properly described in the declaration. As to the objection in arrest of judgment, I think it must be taken, after verdict, that the defendant did suspend his proceedings absolutely, or for a reasonable time.

Rule discharged.

SMITH v. ALGAR.

IN THE KING'S BENCH, NOVEMBER 26, 1830.

[Reported in 1 *Barnewall & Adolphus*, 603.]

ASSUMPSIT. The first count stated that the plaintiff had obtained judgment against one Elizabeth Mackenzie for a debt of 57*l.* and 65*s.* costs, and for satisfaction thereof had sued out a writ of *feri facias* to levy the said debt and costs of the goods of the said E. M.; that the plaintiff was about to enforce the execution of the said writ, and to levy to the amount of 107*l.* upon goods of E. M. of the value of 200*l.*, which the defendant had in his custody; and that afterwards, in consideration of the premises, and that the plaintiff, at the defendant's instance, would forego executing the writ against the said goods for the recovery of the said sum of 107*l.*, defendant undertook to pay plaintiff the last-mentioned sum in seven days then next following; that plaintiff forbore accordingly, but defendant did not pay. The second count stated the consideration to be, that the plaintiff would forbear executing a writ of *feri facias* issued against the goods of E. M., not saying at whose suit or for what sum. The defendant demurred specially to each count; and there was a joinder in demurrer.

Platt, in support of the demurrer, confined his argument to the first count; the Court holding the second to be clearly bad. No legal consideration is shown for the promise. The judgment was for 57*l.* debt, and 65*s.* costs; it does not appear, therefore, that the plaintiff could have any right to levy 107*l.* Forbearance is no consideration where there was originally no cause of action. *Lloyd v. Lee*. If a party is illegally arrested, his release is no consideration for a promise to pay the debt. *Atkinson v. Settree*. To prove a forbearance, it is necessary to show a right in one party which could have been exercised with effect against the other. *Jones v. Ashburnham*. The undertaking here alleged is to pay 107*l.*; it was necessary to show a consideration equally extensive with the promise; but the forbearing to levy 107*l.* was not a valid consideration, inasmuch as the judgment stated would not have warranted a levy to that amount.

Kelly, contra, was stopped by the Court.

LORD TENTERDEN, C. J. I agree in the principles laid down in the cases which have been cited, but they do not appear to me to be applicable. It is true the plaintiff might not perhaps have been entitled to recover to the full extent of 107*l.*, though, it is to be observed, he might have levied the costs of the execution in addition to the sum given by the judgment. But he had a right at least to levy 60*l.*; and if, in consideration of his forbearing that, the defendant promised to pay him the larger sum, — if the inconvenience of an execution against these goods at the time in question was so great that the defendant

thought proper to buy it off at such an expense, — I do not see that the consideration is insufficient for the promise.

PARKE, J. If a plaintiff has a *fiery facias* indorsed to levy 60*l.*, there is no reason why the forbearing to execute such writ should not be a good consideration for a promise by a third person to pay double the amount at the end of seven days. What damages the plaintiff may recover in an action on such a promise is another question.

TAUNTON and PATTESON, JJ., concurred.

Judgment for the plaintiff on the first count.

MORTON v. BURN AND VAUX.

IN THE KING'S BENCH, MAY 25, 1837.

[*Reported in 7 Adolphus & Ellis, 19.*]

ASSUMPSIT. The first count of the declaration stated that, whereas before and at the time of making the promise, &c., to wit, 12th April, 1834, the defendants were indebted to the plaintiff in 728*l.* 2*s.* 6*d.*, and interest thereon from 1st February, 1834, under and by virtue of a bond dated 14th July, 1832, and a certain indenture and deed of assignment thereof, dated 19th October, 1833; and that, according to the condition of the said bond, 228*l.* 2*s.* 6*d.*, part of the said sum of 728*l.* 2*s.* 6*d.*, ought to have been paid on the 1st February then last past; and thereupon, in consideration of the premises, and also in consideration that plaintiff would accept and receive payment of the said sums of money on the days and times after-mentioned, and in the mean time give time to defendants for payment, the defendants undertook, &c., that the whole of the said 228*l.* 2*s.* 6*d.*, with interest from 1st February, 1834, should be paid to plaintiff on or before 1st June then next, or in default thereof that defendants would sign a warrant of attorney to plaintiff to enter up judgment against them forthwith for the same; and that defendants would pay to plaintiff 50*l.* quarterly, on 1st September, &c., in every year, until the further sum of 500*l.* (residue of the said 728*l.* 2*s.* 6*d.*) with interest at 5*l.* per cent. per annum, should be fully paid and satisfied; and in default of paying any of the last-mentioned instalments, defendants would execute a warrant of attorney to plaintiff forthwith to enter up judgment against them for the whole 500*l.* and interest, or so much thereof as might then remain due. Averment, that plaintiff did forbear and give time to defendants for the payment of the said 728*l.* 2*s.* 6*d.* and interest, until and upon the respective days and times mentioned for payment thereof in the said promise and undertaking of the defendants; and although defendants paid plaintiff the said 228*l.* 2*s.* 6*d.* and interest thereon, yet they did

not nor would pay plaintiff 50*l.* quarterly, on the days and times above-mentioned in that behalf, but therein wholly made default; and a large sum of money of the said instalments, viz., 250*l.*, for five several sums of 50*l.*, respectively due on 1st September, 1835, &c., now is wholly due and in arrear, &c.; and although defendants made default in payment of the respective sums on the days and times aforesaid, according to the tenor and effect, &c., of their said promise and undertaking, yet defendants did not nor would execute a warrant of attorney to enable plaintiff forthwith to enter up judgment against them for so much of the 500*l.* and interest as then remained due, &c. There was a second count on an account stated, and for interest.

Pleas: 1. *Non assumpsit*. 2. To the first count, that there was not any good or valuable consideration for the promises in the first count mentioned; conclusion to the country. Issues on both pleas.

On the trial before Coleridge, J., at the Middlesex Sittings after Michaelmas Term, 1836, a verdict was found for the plaintiff. In Hilary Term last, F. Edwards obtained a rule *nisi* for arresting the judgment.

Cresswell and *W. H. Watson* now showed cause. It is objected that the action should have been shaped in debt on the bond, not in assumpsit; and that the declaration shows no consideration for the promise. In Com. Dig., action upon the Case upon Assumpsit (B. 1), it is laid down that assumpsit may be supported upon "consideration of the forbearance of a suit against an heir upon a bond of his ancestor, if he was bound and had assets." Now there the obligee might have sued the heir on the bond. And again, "so, in consideration of forbearance by the assignee of a bond, if he has a letter of attorney to sue and release;" for which *Pitt v. Bridgwater* is cited from Rolle's Abridgment.¹ In *Mowse v. Edney*² it was held that, if A. be indebted to B. by bill, and B. be indebted to C., and B., in satisfaction of his debt, assign A.'s bill to C., and before the day of payment A. promise C. that if he will forbear payment for a week, he will then pay him, and C. do forbear accordingly, still there is no consideration for the promise; because, notwithstanding the assignment of the bill, yet the property of the debt remained always in the assignor. In that case it does not appear that the week would expire before the day of payment arrived; and if not, there would be no advantage to the defendant or detriment to the plaintiff. Without some explanation of this kind, the case is inconsistent with the authorities. In *Potter v. Turnor*³ the defendant had given a bond for 30*l.* to J. B., who had given a bond for 50*l.* to the plaintiff; and J. B. assigned to the plaintiff the debt due from the defendant, and gave the plaintiff a letter of attorney to receive the money to his own use, with a power to sue for it, or release: the

¹ 1 Rol. Abr. 20, *Action sur Case* (V.), pl. 11.

² 1 Rol. Abr. 20, *Action sur Case* (V.), pl. 12; 1 Vin. Abr. 304, *Actions* [of Assumpsit] (U.), pl. 12.

³ Palm. 185; s. c. Winch. 7.

plaintiff demanded the 30% of the defendant, who promised him that, if the plaintiff would forbear and give him respite till Sturbridge fair, he would then pay him: and on motion in arrest of judgment, it was held that this was not a good consideration. This case is certainly against the plaintiff; but it is contradicted by all the other authorities, as is said in note (1) to *Forth v. Stanton*,¹ where the cases are collected; *Reynolds v. Prosser*; ² *Oble v. Dittlesfield*; ³ *Willmot v. Prigget*; ⁴ *Russel v. Haddock*.⁵ In the last case, and in *Reynolds v. Prosser*,² the debt forborne was on a judgment, which, being a higher security than a bond, seems more open to the objection against the form of action. It is sufficient consideration if there be either a benefit to the defendant or a detriment to the plaintiff. Here there are both. The assignee might here sue in the name of the obligee, and this court would not allow the obligee to release the action. The contract sued on is to pay the money or do a collateral act: no one but the plaintiff can take advantage of such a contract. Here too the declaration avers that the defendant was actually indebted to the plaintiff: after verdict it may be assumed that the defendant was a party to the indenture of assignment, and covenanted to pay the plaintiff; then it comes to the simple case of forbearance by a covenantor.

F. Edwards, contra. A detriment to the plaintiff or a benefit to the defendant is a good consideration: but here the agreement to forbear was not binding on the plaintiff; he therefore gave up nothing, and the defendant gained nothing. After the assignment the plaintiff might have sued in equity in his own name, or at law in the name of the obligee. And again the plaintiff's right is not strengthened by the parol agreement: the defendant was not less liable to these suits before the agreement than after; therefore he merely promised what he was before liable to do, which was no consideration for a promise on the part of the plaintiff. *Harris v. Watson*.⁶ Now, if the plaintiff was not bound to perform his part of the agreement, the defendant could not be liable. [PARTESON, J. That proposition seems too broad. Suppose I say, If you will furnish goods to a third person, I will guarantee the payment: there you are not bound to furnish them; yet, if you do furnish them in pursuance of the contract, you may sue me on my guaranty.] Here the contract could only be supported by a consideration perfect and definite at the time of the contract, and such that the party from whom it moved was at the time made incapable of retracting. This is the only principle upon which mutual promises can constitute a consideration; and it is confirmed by *East London Water Works Company v. Bailey*,⁷ *Mowse v. Edney*, and *Potter v. Turnor*. *Fenner v. Meares*⁸ may be considered an authority

¹ 1 Wms. Saund. 210.

² Hard. 71.

³ 1 Ventr. 153.

⁴ 1 Rol. Abr. 29, *Action sur Case* (V.), pl. 60.

⁵ 1 Lev. 188.

⁶ Peake, N. P. C. 72. See Lord Ellenborough's remarks on this case in *Stilk v. Myrick*, 6 Esp. 129; s. c. 2 Campb. 317.

⁷ 4 Bing. 283.

⁸ 2 W. Bl. 1269.

the other way; but that case cannot be relied upon after Lord Kenyon's remarks in *Johnson v. Collings*,¹ and those of Lord Ellenborough in *Williams v. Everett*.² Further, the forbearance is no consideration, unless there was a good cause of action at the time of the contract. Now there was no legal cause of action between these parties. And if the plaintiff rely upon his right to sue in equity, he lets in every equitable answer to the claim, as for instance a set-off against the original obligee. But it is clear that no such set-off would be allowed in this action; the forbearance of the equitable suit can therefore be no consideration here. [PATTESON, J. You must contend that the defendant could have a set-off if the plaintiff proceeded in equity on the new agreement alone. For, if the proceeding were on the bond itself, the defendant would have a set-off at law as much as in equity.] Further, this is an attempt to vary an instrument under seal by a parol agreement. The obligation of the bond itself could not be directly released by parol; neither therefore can this be effected indirectly, either wholly or in part. *Anonymous Case in Cowper*.³ It might be otherwise, if the contract sued on were to do something distinct from the obligation in the bond, as in *White v. Parkin*.⁴ Again, if this were a good contract, the defendant would be liable to two actions on the same instrument; for there is nothing to prevent the original obligee, or an assignee of the present plaintiff, from suing the defendant on the bond at any time. [LITLEDALE, J. That would be an action for a different cause from this: that would be on the bond; this is on the parol contract.] The case of forbearance toward the heir of an obligor has been relied on; but an heir is to pay only if he has assets by descent. That raises a question to be determined by parol evidence. And as the heir's liability is conditional, not absolute like that of the obligor, he may be supposed to promise to pay when he has assets, which creates a liability different from that of the party to the original bond.

Cur. adv. vult.

LORD DENMAN, C. J., in this Term (June 12th) delivered the judgment of the Court.

This is a motion in arrest of judgment. The question is, whether forbearance for a given time on the part of the assignee of a bond to sue the obligors is a good consideration for a promise by the obligors to pay the assignee at the expiration of that time, or give him a warrant of attorney for the amount.

It was objected that there is no mutuality in the agreement; for that, if the plaintiff had sued the defendants in the obligee's name, the promise to forbear would be no answer. Again, that this is a mere *nudum pactum*, being only a promise to do that which the defendants were already bound to do by their bond. And further, that, if this promise be binding, it amounts to varying a deed by parol contract,

¹ 1 East, 104.

³ 1 Cowp. 128, 129.

² 14 East, 582. See p. 587, note (a).

⁴ 12 East, 578.

which is contrary to the rule of law. We do not think any of these objections sufficient to arrest the judgment.

As to the first, there is sufficient mutuality; for although the agreement to forbear would not be pleadable to an action in the name of the obligee, yet, unless the plaintiff did forbear according to his agreement, he would not be able to sue on the defendant's promise. He is obliged to aver, as he does in the present declaration, that he has forborne, which is a condition precedent to his suing.

As to the second objection, this is not a mere *nudum pactum*, for the defendants promise to pay the plaintiff, a third person, whom they were not bound to pay by their bond; and they promise, in consideration of a detriment sustained by the plaintiff at their request, namely, a forbearance to enforce his right in the name of the obligee.

As to the third objection, the bond is in no respect varied by this agreement. The new contract entered into by the defendants with the plaintiff leaves the bond just as it was before; it was forfeited before the agreement, and so it remains; and the agreement would be no answer to an action on it.

The cases on this subject are collected in Mr. Serjt. Williams's notes to *Forth v. Stanton*,¹ and to *Barber v. Fox*,² to which may be added *Yard v. Eland*,³ and other cases collected in Comyns's Digest, Action on the Case upon Assumpsit (B), Consideration. They are all in favor of the action lying, with the exception of *Potter v. Turnor*, which we think inconsistent not only with the current of authorities, but with established principles.

For these reasons we are of opinion that the rule to arrest the judgment in this case must be discharged.

Rule discharged.

WADE v. SIMEON.

IN THE COMMON PLEAS, JANUARY 21, 1846.

[*Reported in 2 Common Bench Reports, 548.*]

ASSUMPSIT. The first count of the declaration stated that the plaintiff had commenced an action against the defendant in the Court of Exchequer for the recovery of the two sums of 1300*l.* and 700*l.*, with interest; that he had declared therein, the defendant had pleaded divers pleas to his declaration, and divers issues had been joined in said action; that the plaintiff had given notice of trial in said action and entered the *nisi prius* record therein, and said trial was appointed to take place on the 7th of December, 1844; that the plaintiff had incurred costs and charges in said action to the amount of, to wit, 300*l.*;

¹ 1 Wms. Saund. 210, note (1).

² 2 Wms. Saund. 137, note (2).

³ 1 Lord Raym. 368.

that on the 3d of said December the defendant had notified the plaintiff that he should apply to the Court of Chancery for an injunction to restrain the plaintiff from issuing execution on any judgment which he might obtain in said action; that thereupon, on the 6th of said December, in consideration that the plaintiff would forbear prosecuting and would stay all proceedings in said action until the 14th of said December inclusive, except as hereinafter stated, the defendant promised the plaintiff to pay him said sums and interest on said 14th of December, together with said costs and charges to be taxed: in default whereof the plaintiff should be at liberty to sign judgment in said action, and that a judge's order might be obtained in said action to secure such payment, and that said application to the Court of Chancery should be abandoned. Averment, that the plaintiff, confiding in said promise, withdrew the said record, and forbore prosecuting and stayed all proceedings in the said action until the said 14th of December, and since then continually hitherto, excepting the taxing of said costs and charges, and the obtaining of said order; that on the 11th of said December the said costs and charges were duly taxed at 8*l.* 1*s.* 10*d.*, whereof the defendant then had notice; and that although the said 14th of December had elapsed before the commencement of this suit, yet the defendant, though often requested, had not as yet paid the plaintiff the said sums of 1300*l.* and 700*l.* with interest, and the said costs and charges so taxed as aforesaid, or either of them, or any part thereof, and the same remained wholly due and unpaid; that from and after the said 14th of December, and thenceforward, the defendant had wholly hindered and prevented the plaintiff from signing judgment in the said action; that on the 27th of January, 1845, the defendant obtained a rule and order of said Court of Exchequer for setting aside a certain order made by Alderson, B., on said 6th of December, pursuant to said promise; and that by means of the premises the plaintiff had been delayed in and hindered and prevented from recovering the said sums and moneys so promised by the defendant to be paid as aforesaid.¹

There was also a count upon an account stated.

Fourth plea, to the first count: That the plaintiff never had any cause of action against the defendant in respect of the subject-matter of the action in the Court of Exchequer in that count mentioned; which he the plaintiff, at the time of the commencement of the action, and thence until and at the time of the making of the promise in the said first count mentioned, well knew. Verification.² . . .

Special demurrer to the fourth plea, assigning for causes, that it does not confess and avoid, or traverse, or deny, any of the matters in the first count alleged; that the matter pleaded affords no defence to the cause of action in that count mentioned; that the plea sets up as a de-

¹ See *supra*, p. 225, note 1. — Ed.

² The original report contains a seventh plea to both counts, and a special demurrer thereto; but as they do not relate at all to the question of "Consideration," they are here omitted, as well as the arguments and decision upon them. — Ed.

fence immaterial matter; that the plea does not allege or shew that the defendant, before or at the time of the making of the promise, was not aware that the plaintiff had no cause for the said action, nor does it allege or shew that the plaintiff concealed any thing from the defendant; that it is ambiguous and uncertain what is meant by the allegation in the plea that the plaintiff never had any cause of action against the defendant in respect of the subject-matter of the said action; that the plea does not exclude all other consideration for the promise in the said count mentioned; that it is ambiguous and uncertain from the plea what is the real defence the defendant intends setting up thereby; and that the plea should have concluded to the country. . . .

The defendant joined in demurrer.

Channell, Serjt., in support of the demurrer. The promise alleged in the declaration consists of four parts: first, that the defendant would pay to the plaintiff 1300*l.* and 700*l.*, with interest and costs, on the 14th of December, 1844; secondly, that in the event of his not paying the same he would suffer judgment; thirdly, that a judge's order should be obtained by consent; fourthly, that the motion in chancery, of which notice had been given, should be abandoned. The breach assigned in the first count is the non-payment of the money and costs on the day appointed. To this the fourth plea affords no answer. In *Longridge v. Dorville* it was held that the giving up of a suit instituted to try a question respecting which the law was doubtful was a good consideration for a promise to pay a stipulated sum.¹ . . . [TINDAL, C. J. That was the case of a relinquishment of a doubtful claim. The present case is more like that put in 1 Rol. Abr. fo. 26, pl. 39: "Si A. fait un void assumpsit à B., et puis un estrangeur vient al B., et en consideration que B. relinquera l'assumpsit fait à luy per A., il assume à paier à luy 10*l.*, ceo n'est bon consideration à luy charger, pur ceo que le primer assumpsit fuit void."] The plea does not allege that the defendant knew [*sic*] at the time he made the promise that the plaintiff had no cause of action; and there is no allegation of fraud. [TINDAL, C. J. It states that there never was any cause of action, and that the plaintiff knew it.] At all events the defendant was relieved from the threatened proceedings in chancery. The plea does not in distinct terms negative any other consideration for the promise. It is in effect an informal plea of *non assumpsit*. [TINDAL, C. J. That is not pointed out as a ground of demurrer.] . . .

Kinglake, Serjt. (with whom was *Barstow*), contra. The fourth plea is good. Under no circumstances can the forbearance to pursue an unfounded claim be a good consideration to support an assumpsit. In Com. Dig., Action upon the Case upon Assumpsit (B. 1), it is said: "The consideration upon which an assumpsit shall be founded must be for the benefit of the defendant, or to the trouble or prejudice of the plaintiff. And therefore a promise in consideration of the forbearance

¹ The learned counsel here stated that case. — Ed.

of a suit is good; for that is for the benefit of the defendant, though the action is not discharged; for forbearance for a reasonable time is sufficient." But "a promise in consideration of forbearance is not good, where there was originally no cause of action; as if a note is given by a *feme covert*." In *Atkinson v. Settree* it was held that, if A. be illegally arrested by B. for a debt, a promise by C. to pay the debt claimed by B., in consideration of B.'s releasing A. out of custody, is void.¹ . . . *Longridge v. Dorville* was the case of a forbearance of a doubtful claim:² The defendants obtained the release of their ship, and the plaintiffs relinquished a security the law gave them: there was therefore abundant consideration for the promise. [MAULE, J. That decision is hardly consistent with some of the cases, wherein it has been laid down that no law is doubtful. *Jones v. Randall*³ is the earliest case in which a question of law is admitted to be of doubtful issue.] In *Edwards v. Baugh* the declaration alleged that disputes and controversies were pending between the plaintiff and defendant respecting a sum of money, and that the defendant promised, in consideration of the plaintiff's forbearing to sue, to pay him 100l.; and it was held bad, for want of averment that any debt was originally due from the defendant to the plaintiff. So, in *Herring v. Dorell*, a plaintiff having discharged one of two joint debtors, a promise by a third person to pay the debt, in order to obtain the discharge of the other from custody, was held to be void for want of consideration. Forbearance of an unfounded suit is in law no forbearance at all. To avoid the difficulty suggested in *Smith v. Monteith*, this plea distinctly alleges that there never was any cause of action in the former suit, and that the plaintiff knew it. . . .

Channell, Serjt., in reply. In nearly all the cases cited the alleged consideration was forbearing to sue, no action having been commenced; here the consideration is forbearing further to proceed with a suit already instituted. This distinction is recognized by Lord Abinger, C. B., in *Edwards v. Baugh*, where he says: "A man may threaten to bring an action against any stranger he may happen to meet in the street. Where an action is depending, the forbearing to prosecute it is a sufficient consideration for a promise to pay a certain sum of money; for, besides other advantages, the party promising would save the extra costs, which he would have to pay even if he were successful."⁴ . . . Here, the plea does not allege that the defendant did not know he had no [*sic*]

¹ The learned counsel here stated the case of *Jones v. Ashburnham*, 4 East, 455. — Ed.

² There, the matter in dispute was about to be decided in a tribunal governed by the civil law, with which the judges, *a fortiori* the lay parties to the compromise, might be presumed to be unacquainted.

³ Cowp. 37. See *Rex v. Grosvenor*, 2 Stra. 1193. And see *Rex v. Justices of Buckinghamshire*, 1 B. & C. 485. In *Doe v. Avis*, Chitty's Statutes, 964, Lord Tenterden is reported to have said at *nisi prius*: "The words of the (stamp) act are so ambiguous that the party objecting ought to make out the affirmative."

⁴ The learned counsel here states the case of *Smith v. Monteith*. — Ed.

defence to the original action. If good, it can only be so on the ground that it shows an entire absence of consideration, which it clearly does not; but if it does, it amounts to *non assumpsit*. [TINDAL, C. J. That is not pointed out as a cause of demurrer.] One ground of demurrer assigned is ambiguity, which lets in this objection. [MAULE, J. The better course probably will be to allow the defendant to amend the fourth plea, by alleging that the plaintiff never had any available cause of action; upon which the plaintiff may take issue. I incline to think the plea bad, but it is doubtful whether the blot is hit by any of the causes of demurrer assigned.]

Kinglake, Serjt., for the defendant, declined to amend.

TINDAL, C. J. The only question now remaining is upon the demurrer to the fourth plea. I am of opinion that the fourth plea is a good and valid plea on general demurrer. The declaration alleges that the plaintiff had commenced an action against the defendant in the Exchequer, to recover two sums of 1300*l.* and 700*l.* respectively, which action was about to be tried; and that, in consideration that the plaintiff would forbear proceeding in that action until the 14th of December then next, the defendant promised the plaintiff that he would on that day pay the money, with interest and costs; that the plaintiff, confiding in the defendant's promise, forbore prosecuting the action, and stayed the proceedings until the day named, but that the defendant did not pay the money or the costs. The fourth plea states that the plaintiff never had any cause of action against the defendant in respect of the subject-matter of the action in the Court of Exchequer, which he the plaintiff, at the time of the commencement of the said action, and thence until the time of the making of the promise in the first count mentioned, well knew. By demurring to that plea the plaintiff admits that he had no cause of action against the defendant in the action therein mentioned, and that he knew it. It appears to me, therefore, that he is estopped from saying that there was any valid consideration for the defendant's promise. It is almost *contra bonos mores*, and certainly contrary to all the principles of natural justice, that a man should institute proceedings against another, when he is conscious that he has no good cause of action. In order to constitute a binding promise, the plaintiff must show a good consideration, something beneficial to the defendant or detrimental to the plaintiff. Detrimental to the plaintiff it cannot be, if he has no cause of action; and beneficial to the defendant it cannot be, for, in contemplation of law, the defence upon such an admitted state of facts must be successful, and the defendant will recover costs; which must be assumed to be a full compensation for all the legal damage he may sustain. The consideration therefore altogether fails. On the part of the plaintiff it has been urged that the cases cited for the defendant were not cases where actions had already been brought, but only cases of promises to forbear commencing proceedings. I must however confess that, if that were so, I do not see that it would make any

substantial difference. The older cases, and some of the modern ones too, do not afford any countenance to that distinction. In *Tooley v. Windham*¹ it is stated that the plaintiff had purchased a writ out of chancery against the defendant, to the intent to exhibit a bill against him. Upon the return of the writ, which was for the profits of certain lands which the father of the defendant had taken in his lifetime, the defendant, in consideration he would surcease his suit, promised to him that, if he could prove that his father had taken the profits or had the possession of the land under the title of the father of the plaintiff, he would pay him for the profits of the land; and the court held that the promise was without consideration and void. There the suit was in existence at the time of the making of the promise. So, in *Atkinson v. Settree*, an action had been commenced at the time the promise was made. These cases seem to me to establish the principle upon which our present judgment rests; and I am not aware that it is at all opposed by *Longridge v. Dorville*. It may be that the peculiar circumstances of that case took it out of the general rule. The ship was under detention by virtue of process from the Admiralty Court. The event of the suit in that court was uncertain; neither party could foresee the result; and therefore the relinquishment by the plaintiff of his hold upon the ship might well be a good consideration for the promise declared on. Here, however, there was no uncertainty: the defendant asserts, and the plaintiff admits, that there never was any cause of action in the original suit, and that the plaintiff knew it. I therefore think the fourth plea affords a very good answer, and that the defendant is entitled to judgment thereon.

MAULE, J. I also am of opinion that the defendant is entitled to judgment on the fourth plea, though I think it extremely questionable whether that plea is not open to objection, provided it were rightly taken. Forbearance to prosecute a suit in which the plaintiff has no cause of action (and in which, as the Lord Chief Justice properly adds, he must eventually fail), according to the authorities, is no consideration. It is no benefit to the defendant, and no detriment to the plaintiff. Costs are considered by the law a sufficient indemnification for a defendant who is sued, where there exists no cause of action; consequently the defendant, in contemplation of law, derives no benefit from a stay of the proceedings. In *Smith v. Monteith* it seems to have been considered that the allegation in the plea, — that the plaintiff had not any claim or demand or cause of action against the original defendant, in respect whereof the plaintiff was entitled to recover the sum which the defendant promised to pay, — did not sufficiently show that the plaintiff must necessarily have failed in the original action; and it may be doubted whether the fourth plea here does sufficiently show that there was no consideration for the defendant's promise, by reason of the plaintiff having no cause of action in the

¹ Cro. Eliz. 206 (more fully reported, 2 Leon. 105).

former suit, and that therefore he must necessarily have failed in that suit. That objection would, I think, have shown the fourth plea pleaded in this case to be bad, provided the objection had been properly pointed out as a cause of demurrer. But, on general demurrer, I think the plea must be taken impliedly to allege that the plaintiff must necessarily have failed, and is therefore sufficient, the absence of a direct allegation to that effect being only ground of special demurrer. It has been contended that this objection is specially pointed out by that part of the demurrer which objects to the plea on the ground that it is ambiguous. That, however, is not, in my opinion, a sufficient assignment of this cause of demurrer, within the statute. Though I feel bound to state my opinion, I confess I should not be much surprised if a court of error should come to a different conclusion upon the doubt suggested.

CRESSWELL, J. The declaration in this case is founded upon a promise by the defendant to pay certain moneys, in consideration of the plaintiff's forbearing to proceed with an action pending in the Court of Exchequer. The answer set up by the fourth plea is, that the plaintiff never had any cause of action against the defendant in respect to the subject-matter of that suit, which the plaintiff well knew. It has been surmised, in the course of the argument, that there is a distinction between abstaining from commencing an action, and forbearing to prosecute one already commenced. In the older cases I find no such distinction. Lord Coke lays it down broadly, that the staying of an action that has been unjustly brought is no consideration for a promise to pay money. I cannot help thinking, on general principles, that the staying proceedings in an action brought without any cause is no good consideration for a promise such as is relied on here. The plea in plain terms avers that the plaintiff never had any cause of action, and that he well knew it. Are we to assume that the defendant might, by some slip in pleading, have failed in his defence to that action if it had proceeded? I think not. On general demurrer the plea appears to me to be sufficient; and none of the causes of demurrer specially assigned in my judgment hits the point made by my brother Channell.

ERLE, J. It appears to me also that the fourth plea is sufficient. The declaration states that the plaintiff had commenced an action against the defendant in the Court of Exchequer to recover certain moneys; that the defendant had pleaded various pleas on which issues in fact had been joined, which were about to be tried; and that, in consideration that the plaintiff would forbear proceeding in that action until a certain day, the defendant promised to pay. The issues joined on that record therefore were perfectly well known and ascertained. The defendant pleads that the plaintiff never had any cause of action against him in respect of the subject-matter of the action in the Exchequer, which he, the plaintiff, at the time of the commencement of the action, and thence until the time of the promise, well knew. I

think the plea must be read as importing a distinct allegation that, upon the issues joined in that action, whether of fact or of law, the plaintiff must have failed. Construing the plea in this way, I think it is a good plea, at least on general demurrer, and that the defendant is entitled to judgment thereon.

Judgment for the defendant on the fourth plea.

SEMPLE v. PINK.

IN THE EXCHEQUER, JUNE 3, 1847.

[*Reported in 1 Exchequer Reports, 74.*]

THE declaration stated that one J. Leigh made his promissory note in writing, and delivered the same to the plaintiff, and thereby promised to pay to the plaintiff or his order 200*l.*, for value received, three months after the date thereof, which period had elapsed before the making of the promise of the defendant hereinafter next mentioned; but the said J. Leigh did not pay the amount of the said note when the same became due, and the amount of the said promissory note being wholly unpaid to the plaintiff, and the said note being then in the plaintiff's hands overdue and unpaid, thereupon, heretofore, to wit, on the 2d of November, 1844, in consideration of the premises, and that the plaintiff, at the request of the defendant, would hold over the said promissory note, and would forbear and give time to the said J. Leigh for the payment of the said moneys in and by said promissory note payable, to wit, for a reasonable time then next following, the defendant then guaranteed and promised the plaintiff to be answerable to him, the plaintiff, for the payment of the said moneys due and payable upon and by virtue of the said promissory note, and to pay him the same, in case the said J. Leigh should make default in paying the same. Averment: that although more than a reasonable time for the plaintiff's forbearing and holding over the said note had elapsed before the commencement of this suit, and although the plaintiff, confiding in the promise of the defendant, did then, to wit, on, &c., hold over the promissory note, and forbear and give time to J. Leigh for the payment of the said sum of money, and hath thence, and for more than a reasonable time in that behalf, to wit, from thence hitherto, held over the said note, and forborne and given time for payment of the said note: yet J. Leigh hath not paid the moneys in and by the said promissory note due and payable, whereof the defendant had notice, and was requested by the plaintiff to pay him, but the defendant hath not paid the same or any part thereof.

Plea: *non assumpsit*.

At the trial before Rolfe, B., at the Middlesex Sittings in last

Hilary Term, the following facts appeared: In July, 1844, the plaintiff agreed to discount a promissory note for 200*l.* for J. Leigh, if the defendant would guarantee payment of the same when due; the defendant having agreed to do so, the note set out in the declaration was made, upon the back of which the defendant wrote the following words: "I do hereby guarantee the payment of the within promissory note by James Leigh, the maker, for the second day of November next. John Pink." The note became due on the 2d of November, and was dishonored; and whilst the plaintiff was the holder of it, the defendant signed the following memorandum, addressed to the plaintiff:—

BLOMFIELD ROAD, MAIDA HILL, NOV. 2, 1844.

I request you will hold over the promissory note in your favor of Mr. James Leigh, dated 31st July, 1844, for 200*l.* at three months; and in consideration of your so doing, I undertake to continue in all respects my guaranty of the same.

I am, Sir, yours truly,

JOHN PINK.

MR. A. SEMPLE, Jr.

It was objected, on the part of the defendant, that there was no evidence of the guaranty set out in the declaration, and that the plaintiff ought to be nonsuited. The learned judge was of that opinion and directed a nonsuit, reserving liberty to the plaintiff to move to enter a verdict for the amount of the note.

Miller having obtained a rule *nisi* accordingly,

Ogle shewed cause. The plaintiff was properly nonsuited. The plea of *non assumpsit* puts in issue not only the promise, but also the consideration on which it is founded. The consideration stated in this declaration is forbearance for a reasonable time; but there is no evidence of such consideration. The memorandum of the 2d of November mentions no time for which the plaintiff was to hold over the note, and the pleader is not warranted in treating it as a contract to forbear for a reasonable time. Even if the memorandum be read together with the indorsement on the back of the note, the two documents will not support the declaration; for the latter is merely an undertaking to pay the note when due, and the former an agreement to continue a guaranty not founded on any consideration. Mere forbearance is not a sufficient consideration to support a promise to pay the debt of another; but there must be a forbearance for a certain or reasonable time. *Chitty on Contracts*, p. 30; *Cole v. Dyer*.¹ The law will not imply any such consideration from the terms of these instruments.

Miller, in support of the rule. The memorandum of the 2d of November supports the declaration. It is a rule of law that, where no time is mentioned in a contract, the law implies a reasonable time. Where a party undertakes to deduce title to an estate, he has a reasonable time for that purpose. [*ALDERSON, B.* Making out a title is an act which necessarily requires some time; but suppose in this case the

¹ 1 C. & J. 461.

plaintiff had brought his action the next minute, would that be a forbearance? In a case like the present, what definite idea can you attach to forbearance for a reasonable time? The meaning of the words may depend upon the character of the party, — whether he is litigious, or whether he is mild and somnolent. It will be found that the cases in which the law implies a reasonable time are those in which the particular act requires some time to do it. ROLFE, B. The declaration seems to be bad. ALDERSON, B. The guaranty itself is defective.]

PER CURIAM. The rule must be discharged.

Rule discharged.

MARIA OLDERSHAW AND ROBERT MUSKET, *Executrix and Executor of* ROBERT OLDERSHAW, v. WILLIAM THOMAS KING.

IN THE EXCHEQUER, MAY 23, 1857. — IN THE EXCHEQUER CHAMBER, JUNE 22, 23, 1857.

[Reported in 2 Hurlstone & Norman, 399, 517.]

THIS was a special case stated for the opinion of the Court.

The action was brought by the plaintiffs, as executrix and executor of Robert Oldershaw, to recover the sum of 731*l.* 9*s.* 3*d.* upon the defendant's guaranty.

In August, 1848, John and Joseph Francis King being indebted to the testator, Robert Oldershaw, who was their attorney, in a considerable sum of money, applied to him for further advances, which he declined to make unless he had the defendant's guaranty. The defendant, after some correspondence, signed the following memorandum: —

21 MANCHESTER TERRACE, August 24, 1848.

DEAR SIR, — I am aware that my uncles J. and J. F. King stand considerably indebted to you for professional business, and for cash lent and advanced to them, and that it is not in their power to pay you at present; and as in all probability they will become still further indebted to you, though I by no means intend that this letter shall create or imply any obligation on your part to increase your claim against them, I am willing to bear you harmless against any loss arising out of the past or future transactions between you and my said uncles to a certain extent; and therefore, in consideration of your forbearing to press them for the immediate payment of the debt now due to you, I hereby engage and agree to guarantee you the payment of any sum they may be indebted to you upon the balance of accounts between you at any time during the next six years, to the extent of 1000*l.*, whenever called upon by you to pay the same, and after twelve calendar months' previous notice.

I remain, &c.,

WILLIAM THOMAS KING.

To ROBERT OLDERSHAW, Esq.

The above guaranty was handed to the testator, Robert Oldershaw,

on the twenty-fifth day of August, 1848, on which day he advanced to John and Joseph Francis King 170*l.* Previously thereto he had advanced to them 513*l.* in money. After the 25th of August, 1848, he paid to John and Joseph Francis King various sums, amounting in the whole to 520*l.* The transactions went on till the 10th of July, 1849, when John and Joseph Francis King became bankrupts. At the date of the fiat there was due from the said John and J. F. King to the testator, Robert Oldershaw, 2184*l.* 16*s.* 4*d.*

After the realization of the securities in the hands of the testator, and the receipt of a dividend under the estate of John and J. F. King, there remained due to the plaintiffs, as executrix and executor of the said Robert Oldershaw, who died in May, 1851, the sum of 731*l.* 9*s.* 3*d.*; and on the 6th of June, 1854, the plaintiffs gave notice to the defendant that the said sum of 731*l.* 9*s.* 3*d.* was due and owing, and requested him, under the terms of his guaranty, to pay the amount of the same to them.

It is agreed between the parties that all things necessary to be done, and all conditions precedent, have been performed and fulfilled, and all times have elapsed necessary to enable the plaintiffs to recover the said sum of 731*l.* 9*s.* 3*d.*, provided the Court shall be of opinion that the defendant, under said memorandum and facts stated, is liable to pay the same.

The questions for the opinion of the Court are; first, whether on the above facts the defendant is liable or not; and, secondly, to what extent.

Knowles (with whom was *W. M. Cooke*) argued for the plaintiffs in last Michaelmas Term (No. 10).¹ . . . The forbearing to press for immediate payment of the debt is a sufficient consideration to support the promise. A reasonable construction must be put upon the words. It is a question of fact whether the testator did press for immediate payment. Waiting for a very short time, such as an hour, might be an illusory forbearance. But the Court will not entertain any question as to the adequacy of the consideration. Indeed, forbearance for a day, or even a less time, might be a matter of importance to the parties. The word "immediate" need not be construed literally. Page v. Pearce.² [ALDERSON, B. "Pleading immediately" means pleading in twenty-four hours.] In *Mapes v. Sidney*³ a promise in consideration that the plaintiff would forbear, with an allegation that the plaintiff did forbear *per magnum tempus*, was held good. [ALDERSON, B. Here the word "immediate" shows that the forbearance is not to be perpetual.] It is enough if it amounts to an agreement to suspend the remedy. In *Payne v. Wilson* an agreement to pay a sum of 30*l.* on the 1st of April, in consideration that the plaintiff would "suspend proceedings," was held to be binding.

¹ Only so much of the case is here given as relates to the question of "Forbearance."—Ed.

² 8 M. & W. 677.

³ Cro. Jac. 683.

Petersdorff, for the defendant. . . . Forbearance for a long or a short or for some time is not a good consideration to support a promise; it must be an absolute forbearance, or for a definite time. Com. Dig., Action upon the Case upon Assumpsit (B. 1). In *Mapes v. Sidney* the consideration was forbearance to sue for a debt, and that was held good, two of the judges being of opinion that it should be intended a total and absolute forbearance. *Semple v. Pink* shows that forbearance generally, or for a reasonable time, is not a sufficient consideration. *Bell v. Welch*¹ is also an authority in the defendant's favor. . . .

Knowles, in reply. Forbearance to press for immediate payment is a good consideration. In *Payne v. Wilson* it was held that a consent to stay proceedings on a *cognovit* was a sufficient consideration to support a promise to pay the debt. *Littledale, J.*, there said, that after verdict it must be taken that the proceedings were suspended absolutely, or for a reasonable time. . . .

Cur. adv. vult.

The Court having differed in opinion, the following judgments were delivered: —

BRAMWELL, B. My brother Watson and myself are of opinion that the defendant is entitled to judgment. The consideration mentioned for the defendant's promise is forbearing to press for the immediate payment of the debt now due; and this in our judgment is void for uncertainty. The authorities which have been referred to show that a guaranty in consideration of forbearance "for some time," or "a little time," is void. In the present case the word is "immediate." That cannot mean "instantaneous," and any thing beyond is uncertain. It was argued that, no time being named, it was to be taken to be that a reasonable time was intended. That is not so, as it is to "forbear to press for immediate payment," not forbear for a reasonable time. However, assuming it were so, that is equally vague and uncertain. In the result, one may be able to say in each particular case if the creditor has waited a reasonable time; but it is impossible to lay down a rule as to what does or does not constitute such a time between a debtor and creditor; and accordingly it was so held in *Semple v. Pink*, where the reasoning of Baron Alderson and the remark of Baron Rolfe are to the effect that such a guaranty as stated in the declaration in that case, is void for uncertainty. Then, whether this consideration be read to be to forbear for a reasonable time, or to forbear to press for immediate payment, it is void. *Mapes v. Sidney* will not help the plaintiffs on either ground of its decision, for here the agreement to forbear is not absolute; nor is Lord Hobart's reason applicable, as the consideration for the agreement must now be in writing. . . .

We are of opinion, therefore, that the plaintiffs are not entitled to recover; and we cannot help adding that, though we doubt not that the intention of the testator was perfectly fair, as indeed is shown by the

¹ 9 C. B. 154.

indulgence he gave, and that he desired not to tie himself up only because of the loss which might thereby accrue, still that he did endeavor to get a binding promise without giving any consideration for it, and in reality fails in consequence. What the defendant substantially bargained for was forbearance to the principal debtor, and to this he never had a right, though it was granted in fact.¹

Judgment for the defendant.

Error on the foregoing judgment.

COCKBURN, C. J. . . . Supposing that the sole consideration was the forbearing to press for immediate payment, I should not be prepared to assent to the doctrine laid down in *Semple v. Pink*. There are authorities for saying that an agreement to forbear for a short time, or a little time, is too indefinite to constitute a consideration for a contract; but I am not at all prepared to assent to the proposition that an agreement to forbear for a reasonable time would not be sufficient. I see no reason why the question as to what is reasonable time should not be considered and determined with reference to the circumstances of the case by a jury. As, however, in the view I take of this case, the contract discloses a sufficient consideration independently of such forbearance, it is not necessary to go the length of overruling *Semple v. Pink*.

ERLE, J. . . . Looking at the whole letter, and the circumstances under which it was written, and considering the importance of further advances, I come to the conclusion that the consideration contemplated was that further advance should be made, and time given by the creditor before he would press for the payment of the existing debt. Though the contract did not bind the creditor to make further advances, or to give time unless he chose to do so, it is clear that if he did make the advances, and did give time, that which was contingent at the time when the instrument was written became an absolute and binding contract. I am also of opinion that, although the amount of further advances and of the time to be given is not defined, still, if time is given and advances are made, it is enough. These undefined terms ought to receive a construction in reference to the facts given in evidence *ut res magis valeat quam pereat*. If the guarantor has had the advantage he bargained for, we must hold him to his promise. That suffices for the judgment of reversal in the present case. I concur with the Lord Chief Justice with respect to the case of *Semple v. Pink*. I do not assent to the doctrine that a guaranty in consideration of an agreement to give time is void unless the time to be given is defined in the contract. But it is not necessary to decide that point.

CROMPTON, J. . . . The consideration was that Oldershaw should not press for immediate payment, and I think that the giving a reasonable time is a sufficient consideration. In the old authorities mentioned in *Comyns* it is said to be sufficient if there is an agreement for for-

¹ Pollock, C. B., delivered a dissenting opinion; but as it does not relate materially to the question of "Forbearance," it is here omitted. — Ed.

bearance for a definite portion of time, or for a reasonable time; and in *Payne v. Wilson* Lord Tenterden rests his judgment on the ground that it must be taken that the plaintiff had suspended proceedings for a "definite or reasonable time." I do not see any great difficulty in saying that what is a reasonable time may be determined at *nisi prius*. It may be difficult to say what a reasonable time is; but the difficulty is not greater than in many other cases where there is a promise to do a thing in a reasonable time. And the only distinct authority against that is the case of *Semple v. Pink*. The court, however, in that case had really to decide whether there was a variance between the guaranty proved and that set out in the declaration. If I had to decide that case now, I should be inclined to say that a reasonable time might be implied, because no time was mentioned in the contract. That was the point before the Court.

WILLES, J. I am of the same opinion. Assuming that we are only to look to the words of the document, and to see what is there stated as the consideration for the contract without regard to the previous recital, the consideration would appear to be "forbearing to press for the immediate payment of the debt due." There are many authorities which show that in cases like the present the word "immediate" may be construed to mean within a reasonable time to do the act in question.¹ Accordingly, I think that forbearing to press for immediate payment means forbearance for a reasonable time. Then it is said that that is not a sufficient consideration, because of the indefiniteness of the word "reasonable;" and because it might be competent to the person who enters into a contract, engaging to forbear for a reasonable time, to sue the next instant, or within a very short time. Looking for a moment to the mode in which the question of reasonable or unreasonable time would be determined, the difficulty vanishes. The question whether the creditor had forborne for a reasonable time or not would be determined by the jury. Now, suppose the consideration expressed had been forbearing for such a time as a jury who might try the question should consider reasonable, there can be no doubt but that it would be a perfectly good contract, and for a good consideration. That is what is tacitly expressed in this instrument. There are many cases in which, the reasonableness of the time in which to do a thing not being fixed by legal decisions, as in the case of the dishonor of a bill of exchange, it is left to the jury as a question of fact with reference to the circumstances of the particular case. I do not see on what principle an agreement to forbear for a time stipulated for by the parties should not constitute a good consideration. There are authorities to that effect: *Com. Dig., Action on the Case on Assumpsit* (B. 1). In *Payne v. Wilson*, Lord Tenterden seems to treat it as clear that the forbearance for a reasonable time would be a sufficient

¹ See *Thompson v. Gibson*, 8 M. & W. 281; *Page v. Pearce*, 8 M. & W. 677. The learned judge referred also to *Regina v. Brownlow*, 11 A. & E. 119.

consideration. No doubt there are authorities on the other side ; but if we are to choose between authorities, one class of which tends to defeat, and the other class to uphold the intention of the parties, I should have no difficulty in adhering to the latter class. . . .

*Judgment reversed.*¹

THE ALLIANCE BANK LIMITED v. BROOM.

IN CHANCERY, NOVEMBER 14, 21, 1864.

[*Reported in 2 Drewry & Smale, 289.*]

THIS case came on upon a demurrer.

It appeared from the bill that, in June, 1864, the Alliance Bank opened a loan-account with the defendants, who are merchants at Liverpool, and that such loan-account was continued down to the 19th of September, 1864, when there was a balance due from the defendants to the bank on such loan-account to the amount of 22,205*l.* 15*s.* 1*d.*

On the 19th of September, 1864, the plaintiffs requested the defendants, Messrs. Broom, to give them some security for the amount so due ; and the defendants, who stated that they were entitled to certain goods, wrote to the manager of the bank the following letter : —

LIVERPOOL, 19th Sept., 1864.

DEAR SIR, — We hand you the following particulars of produce, which we propose to hypothecate against our loan-account, and at the same time undertake to pay the proceeds, as we receive them, to the credit of the said account.

The letter then contained a list of goods and their values, and was signed by Messrs. Broom.

In pursuance of this letter the plaintiffs, on the 20th of September, 1864, applied to the defendants for the warrants for delivery of the goods mentioned in the letter, and the defendants promised to deliver the warrants to the plaintiffs as soon as they could obtain them from the warehouses.

The bill stated that the defendants refused to deliver the warrants, or other documents relating to the goods, to the plaintiffs, and threatened and intended to deliver them to other persons ; and the bill charged that the plaintiffs were entitled to a lien or charge upon the goods mentioned in the letter by virtue of the agreement, and prayed for a declaration to that effect. The bill also prayed that the defendants might be ordered to deliver to the plaintiffs the warrants and other documents relating to the title of said goods, and cause the said goods to be delivered to the plaintiffs, by way of security for the amount due

¹ See *Wynne v. Hughes*, 21 Weekly Rep. 628. — ED.

to them on the loan-account. The bill also prayed an injunction to restrain the defendants from dealing with the warrants or goods in the mean time.

To this bill the defendants filed a demurrer, on the ground that the agreement contained in the letter was without consideration; and therefore one which the Court would not enforce.

Mr. *Daniel* and Mr. *J. N. Higgins*, for the defendants, in support of the demurrer, contended that the agreement contained in the letter was executory; being also without consideration, the Court would not enforce it. The existence of a debt was no sufficient consideration to support the agreement. There was a distinction between a motive and a consideration, — what might be good as a motive might be bad as a consideration; and that was so in this case. And therefore the bill, which sought the specific performance of such an agreement, could not be sustained. They referred to *Eastwood v. Kenyon*, *Thomas v. Thomas*, *Hopkins v. Logan*, *Kaye v. Dutton*, *Smith on Contracts*,¹ *Addison on Contracts*.²

Mr. *Bevir*, for the plaintiffs, in support of the bill, submitted that there was a good consideration for the agreement; namely, forbearance on the part of the plaintiffs from calling in their money. *Twyne's Case*.³

Mr. *Daniel*, in reply.

The Vice-Chancellor reserved judgment.

NOVEMBER 21.

The VICE-CHANCELLOR,⁴ after stating the facts, said : —

The defendant demurs to the plaintiff's bill in this case, on the ground that the promise to give security, which the plaintiff seeks to enforce, was without any consideration, — that it is in fact a *nudum pactum*, which the court will not enforce; and in support of this proposition it is argued that the plaintiffs, so far from giving any consideration for the promise, could at any time have brought an action for the payment of the debt; and that they could have done so is perfectly true.

Now, according to the facts stated in the bill, a demand was made by the creditor for security; and upon that demand a promise and agreement was made by the debtor that he would give such security, and that, although it might take some time to get the warrants, he would hand them over to the creditor when he obtained them.

It appears to me, that when the plaintiffs demanded payment of their debt, and in consequence of that application the defendant agreed to give certain security, although there was no promise on the part of the plaintiffs to abstain for any certain time from suing for the debt, the effect was, that the plaintiffs did in effect give, and the defendant received, the benefit of some degree of forbearance, not indeed for any

¹ p. 89.

² 3 Coke, 80 b.

³ pp. 6 and 296.

⁴ Sir R. T. Kindersley. — Ed.

definite time, but at all events some extent of forbearance. If, on the application for security being made, the defendant had refused to give any security at all, the consequence certainly would have been that the creditor would have demanded payment of the debt, and have taken steps to enforce it. It is very true that, at any time after the promise, the creditor might have insisted on payment of his debt, and have brought an action; but the circumstances necessarily involve the benefit to the debtor of a certain amount of forbearance, which he would not have derived if he had not made the agreement.

On this ground the demurrer must be overruled.¹

CALLISHER v. BISCHOFFSHEIM.

IN THE QUEEN'S BENCH, JUNE 6, 1870.

[*Reported in Law Reports, 5 Queen's Bench, 449.*]

DECLARATION that the plaintiff had alleged that certain moneys were due and owing to him, to wit, from the government of Honduras, and from Don Carlos Gutierrez and others, and had threatened and was about to take legal proceedings against the said government and persons to enforce payment of the same; and thereupon, in consideration that the plaintiff would forbear from taking such proceedings for an agreed time, the defendant promised to deliver to the plaintiff certain securities, to wit, bonds or debentures, called Honduras Railway Loan Bonds, for sums to the amount of 600%. immediately the bonds should be printed. Averment: that the plaintiff did not take any proceedings during the agreed period or at all; and that all conditions had been fulfilled necessary to entitle him to sue in respect of the matters before stated. Breach: that the defendant had not delivered to the plaintiff the bonds or any of them.

Plea: That at the time of making the alleged agreement no moneys were due and owing to the plaintiff from the government and other persons.

Demurrer and joinder.

James, Q. C. (Rose with him), in support of the demurrer. The plea is bad, and affords no answer to the declaration, which discloses a good cause of action. The consideration for the defendant's promise or contract is sufficient; it is sufficient if the contractor, or some third person, avoids some detriment or injury; here the annoyance and expense of an action are avoided. In *Llewellyn v. Llewellyn* the declaration alleged that there were disputes concerning accounts between the plaintiff and defendant, and in consideration that the plaintiff would relinquish all claims the defendant promised he would

¹ See *Boyd v. Freize*, 5 Gray, 553.

pay the plaintiff an annuity. There was no allegation that any sum was due to the plaintiff; it might be that the plaintiff's claim could not be sustained; but it was held that the declaration disclosed a sufficient consideration. [BLACKBURN, J. We must assume, on this record, that the plaintiff believed that he had a valid claim against the Honduras government.] *Cook v. Wright* is in point. There the defendant knew he was not liable to satisfy the claim made by the plaintiff; but the plaintiff, *bona fide* believing him to be personally liable, threatened to take proceedings, and a forbearing to take those proceedings was held a good consideration for the defendant compromising the claim by giving promissory notes. In *Wade v. Simeon* it was expressly averred in the plea that the plaintiff knew he had no cause of action, and it was therefore held good. The plaintiff has fulfilled his part of the contract, he has abstained from enforcing his claim whether good or bad, and the defendant ought not to be allowed to say he will not fulfil his contract. The position of the parties is altered, and the plaintiff may have been put to expense in stopping the proceedings. The consideration is not an abandonment of an unfounded claim, but a postponement of the prosecution of the suit.

Pollock, Q. C. (*Joyce* with him) contra. Forbearance to prosecute a groundless action affords no consideration capable of supporting a promise. It is admitted on the record that no money was due to the plaintiff from the Honduras government; and if the declaration and plea are read together, it is clear that a cause of action does not exist. All the cases are consistent with this view except *Cook v. Wright*; and that case is distinguishable. There the question was not whether a sum of money was due to the plaintiff, but whether it was due from the defendant or another person; whereas here the question, before the contract declared on was made, was whether a sum of money was due to the plaintiff from the Honduras government. In *Edwards v. Baugh* the declaration was held bad because there was not any allegation that a debt was due, but merely that a dispute existed respecting it; and in *Wade v. Simeon* it was held that forbearance to prosecute a groundless claim gave no benefit to the promisor, and imposed no detriment on the promisee.

James, Q. C., replied.

COCKBURN, C. J. Our judgment must be for the plaintiff. No doubt it must be taken that there was in fact no claim by the plaintiff against the Honduras government which could be prosecuted by legal proceedings to a successful issue; but this does not vitiate the contract and destroy the validity of what is alleged as the consideration. The authorities clearly establish that, if an agreement is made to compromise a disputed claim, forbearance to sue in respect of that claim is a good consideration; and whether proceedings to enforce the disputed claim have or have not been instituted makes no difference. If the defendant's contention were adopted, it would result that in no case of a doubtful claim could a compromise be enforced. Every day a compro-

mise is effected on the ground that the party making it has a chance of succeeding in it; and if he *bona fide* believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration. When such a person forbears to sue he gives up what he believes to be a right of action, and the other party gets an advantage; and, instead of being annoyed with an action, he escapes from the vexations incident to it. The defendant's contention is unsupported by authority.

It would be another matter if a person made a claim which he knew to be unfounded, and by a compromise derived an advantage under it: in that case his conduct would be fraudulent. If the plea had alleged that the plaintiff knew he had no real claim against the Honduras government, that would have been an answer to the action.

BLACKBURN, J. I am of the same opinion. The declaration, as it stands, in effect states that the plaintiff, having alleged that certain moneys were due to him from the Honduras government, was about to enforce payment, and the defendant suggested that the plaintiff's claim, whether good or bad, should stand over. So far, the agreement was a reasonable one. The plea, however, alleges that at the time of making the agreement no money was due. If we are to infer that the plaintiff believed that some money was due to him, his claim was honest, and the compromise of that claim would be binding, and would form a good consideration, although the plaintiff, if he had prosecuted his original claim, would have been defeated. This case is decided by *Cook v. Wright*. In that case it appeared from the evidence that the defendant knew that the original claim of the plaintiff was invalid, yet he was held liable, as the plaintiff believed his claim to be good. The Court say that "the real consideration depends on the reality of the claim made, and the *bona fides* of the compromise." If the plaintiff's claim against the Honduras government was not *bona fide*, this ought to have been alleged in the plea; but no such allegation appears.

MELLOR, J. I am of the same opinion. If the plaintiff's claim against the Honduras government was fraudulent, the defendant ought to have alleged it.

LUSH, J., concurred.

*Judgment for the plaintiff.*¹

¹ *Ockford v. Barelli*, 25 *Law Times*, n. s. 504, *accord.*: *Graham v. Johnson*, L. R. 8 Eq. 36, *contra.* — ED.

SECTION VI.

Compromise.

ANONYMOUS.

IN THE KING'S BENCH, HILARY TERM, 1661.

[Reported in 1 *Siderfin*, 31, *placitum* 9.]

FATHER and son: The father is indebted to J. S. in 100*l.*, and makes a fraudulent deed, and by it gives all his property to the son. The father dies; and upon discourse had of the fraudulent deed the son promises J. S., in consideration that he will deliver the obligation to him, and make to him an acquittance and discharge of the debt, that he will pay the 100*l.* And upon this an action was brought; and it was now moved in arrest of judgment that the consideration was not good; because it does not appear that the son was liable to the payment of the debt, either as heir, executor, administrator, or executor *de son tort*; and therefore the delivery of the obligation and the making of the acquittance and discharge to him is not good.

But it was answered and resolved that the consideration was good, and it shall be intended that he was liable, or at least that the discharge shall be made to the party who was liable; for he promises to make a discharge of the debt, and this shall be intended to the party who was liable to the payment of it, or else it would be no discharge.¹

¹ "If that was in truth a fraudulent deed of gift of the goods by the father to the son, as stated in the case, the son, after his father's death, would be chargeable for this debt as an executor of his own wrong, though possession of the goods had been delivered to him at the time of the deed. For it is holden that if a man makes a fraudulent gift of his goods in his lifetime to oust his creditors of their debts, the vendee after his death shall be charged for them. 1 Roll. Abr. 549 (C.), pl. 3. And the only way in which he can be so charged is as executor of his own wrong. 2 Leon. 223, *Stanford's Case*; Cro. Jac. 271, *Hawes v. Leader*; Yelv. 197, s. c., where it is said that the goods are liable to the creditors in the hands of the vendee, as an executor of his own wrong, if the deed of gift be fraudulent. And the reason is, because every intermeddling without authority after the death of the party makes the person so intermeddling an executor of his own wrong. Dyer, 166 b, *Stoke's Case*. And the same point was recognized in the case of *Edwards v. Harben*, 2 Term Rep. 587, where it is adjudged that, if a creditor takes an absolute bill of sale of the goods of his debtor which is fraudulent against creditors, and the debtor dies, and thereupon the vendee takes and sells the goods, he is liable to be sued as executor of his own wrong for the debts of the deceased. Hence it seems to follow that the son was in the case in 1 Sid. liable to the payment of the debt, at least to the extent of the value of the goods, as executor of his own wrong; and therefore the delivering of the bond to him, and giving him an acquittance, appears to be a sufficient consideration to support his promise. For which reason that case seems to differ materially from the principal one." Serjeant Williams, note (2) to *Barber v. Fox*, 2 Wins. Saund. 136. — Ed.

LONGRIDGE AND OTHERS v. DORVILLE AND ANOTHER.

IN THE KING'S BENCH, OCTOBER 29, 1821.

[Reported in 5 Barnewall & Alderson, 117.]

DECLARATION alleged, "that before the making of the promise, &c., a certain ship called the *Carolina Matilda* had then lately in a certain place, to wit, in the river *Thames*, to wit, at, &c., run foul of a certain other ship called the *Zenobia*, whereby the said last-mentioned ship had received great damage. And the said last-mentioned ship having received such damage in consequence of being so run foul of as afore said, the plaintiffs being the agents in that behalf of one — Symonds, the owner of the *Zenobia*, and the defendants being the agents in that behalf of the owners of the *Carolina Matilda*, the former, as such agents, detained the *Carolina Matilda* till the owners of the said last-mentioned ship should have made good to them the damage so done to the *Zenobia*." It then stated, "that in consequence of such detention, the defendants undertook that they would, on the plaintiffs' renouncing all claims on the *Carolina Matilda*, and on proving the amount of the damages sustained by the *Zenobia*, indemnify the plaintiffs for any sum not exceeding 180*l.*, the exact amount to be ascertained when the said latter ship should have been repaired;" and then alleged that, in consequence of such undertaking, the plaintiffs did renounce all claim on the *Carolina Matilda*, and did permit and allow her to proceed on her voyage, and that the *Zenobia* had been repaired, and that the amount of such repairs was ascertained. There were also the common counts, and the defendants pleaded the general issue. The cause was tried before Abbott, C. J., at the Sittings after Easter Term, 1820, when a verdict was found for the plaintiffs, subject to the opinion of this Court upon the following case:—

The Norwegian ship, called the *Carolina Matilda*, on her voyage to Norway, in sailing down the river *Thames* in November last, ran foul of the ship called the *Zenobia*, then lying at anchor, and in consequence of which the latter ship sustained considerable damage. The plaintiffs, acting as the agents of Mr. R. Symonds, the owner of the *Zenobia*, instituted a proceeding in the High Court of Admiralty against the ship *Carolina Matilda*, to compel her owners to make good the damages sustained by the *Zenobia* in consequence of being so run foul of. Process was issued against the *Carolina Matilda*, under which she was arrested at Gravesend on the 22d November last, and on the twenty-fourth day of the same month the defendants wrote a letter to the plaintiffs, of which the following is a copy:—

MESSRS. LONGRIDGE, BARNETT, AND HODGSON.

GENTLEMEN,—In consequence of your having detained the Norway ship *Carolina Matilda* till the owners make good to you the damage done to the

Zenobia, bound to Smyrna, we hereby engage, on your renouncing all claims on the said ship *Carolina Matilda*, and on proving the amount of damages sustained by the *Zenobia*, to indemnify you for any sum not exceeding 180*l.*, the exact amount to be ascertained when the *Zenobia* is repaired.

The defendants were the agents of the owners of the *Carolina Matilda*; and upon the receipt of this letter the plaintiffs withdrew proceedings in the Admiralty Court, and the officer, then in possession of the *Carolina Matilda*, was then also withdrawn, and such possession delivered up to the defendants, acting on behalf of her owners. The *Zenobia* had been since repaired, and the amount of damages sustained by her had been ascertained. At the time the *Carolina Matilda* sailed, and while she was proceeding down the river and ran foul of the *Zenobia*, she had the regular Trinity House pilot aboard, who had been placed there by the defendants.

Puller, for the plaintiff. It is not necessary to consider the question whether the owners of the *Carolina* are liable for the damage done to the *Zenobia*, under the circumstances of the case; for the defendants have made themselves liable by an express promise, founded upon a good consideration. The plaintiffs agree to release the ship, which they might otherwise have detained until bail was given; and the defendants agree to pay a stipulated sum by way of damage; waiving all question as to the legal liability of the owners. That might be considered as doubtful, there having been contradictory decisions.¹ The defendants, or their principals, therefore, have obtained a benefit by the immediate release of the ship; and that constitutes a good consideration for the promise laid in the declaration.

F. Pollock, contra. There is no sufficient consideration for the promise in the declaration, because the plaintiffs had no ground for instituting the suit in the Admiralty Court against the *Carolina*. The question whether the defendants are liable upon their undertaking must depend upon this, whether the owners were liable for the injury, the ship at the time having on board a pilot, as required by the act of parliament. If they were not liable, the plaintiff had no right to institute the suit in the Admiralty Court; and the forbearance of a suit, where a party is not liable, is not a good consideration. *Tooley v. Windham*² and *King v. Hobbs*³ are authorities in point.

ABBOTT, C. J. I am of opinion that there is a sufficient consideration in this case to sustain the promise, without inquiring whether the owners of the ship are liable under the circumstances of the case. It appears that a suit had been instituted by the plaintiffs in the Court of Admiralty against the *Carolina Matilda*, to compel her owners to make good the damage done by her running foul of another vessel. The ship might have been redeemed from that suit by the defendants' giving bail that proper care should be taken of the ship, and that those

¹ *Neptune the Second*, 1 Dodson, Adm. R. 467; *Ritchie v. Bowsfield*, 7 Taunt. 309.

² Cro. Eliz. 206.

³ Yelv. 25.

on board her should not leave the kingdom until means were taken to secure that evidence which would enable the judge to decide the suit; and the plaintiffs might have insisted on such bail. The defendants, as agents for the foreign owners of the ship, write a letter, in which they engage, on the plaintiffs' renouncing all claims on the ship, and on proving the amount of damages sustained by the *Zenobia*, to indemnify them for any sum not exceeding 180*l.*, the exact amount to be ascertained when the *Zenobia* is repaired. Now the plain meaning of that engagement appears to me to be this: Release the ship, and we will waive all questions of law and fact, except the amount of damage; we will pay you 180*l.*, if the damage done amounts to that sum. The plaintiffs, by not insisting upon the bail required, therefore relinquished a benefit which they might have had, if the law had been with them. The law might fairly be considered as doubtful, for there had been contradictory decisions on the subject; and the parties agree to put an end to all doubts on the law and the fact, on the defendants' engaging to pay a stipulated sum. I am of opinion that this case is distinguishable from those cited in argument, inasmuch as in this case the law was doubtful, and the parties agreed to waive all questions of law and fact. I am therefore of opinion that the plaintiff is entitled to recover.

BAYLEY, J. I am of the same opinion. Where a cause is depending, it is competent to a party to refer the questions of liability and damage jointly, or to acknowledge his liability, and refer the question of damage only; and in this case, I think, the effect of the agreement is, that they, the defendants, acknowledge the liability of the owners, and, in consideration of the plaintiffs releasing the ship, they agree to refer the question as to the amount of damage, and pay the same, provided it does not exceed 180*l.* If it had appeared in this case that the owners of the *Carolina* could not have been liable at all, I agree that the consideration for the promise would have failed. But the facts stated in the case by no means show that the owners would not have been liable; for by the pilot act the owners are only protected in those cases where the loss arises from the default, neglect, incapacity, or incompetency of the pilot. Now there is no fact in this case which shows that the misconduct of the pilot was the cause of the injury.

HOLROYD, J. I am of the same opinion. If a person is about to sue another for a debt, for which the latter is not answerable, the mere consideration of forbearance is not sufficient to render him liable for that debt. Any act of the plaintiff, however, from which the defendant derives a benefit or advantage, or any labor, detriment, or inconvenience sustained by the plaintiff, is a sufficient consideration to support a promise. Now the consideration of forbearance is a benefit to the defendant, if he be liable; but it is not any benefit to him, if he be not liable. The authorities cited proceed on that ground. This case differs materially from those; for here a suit actually commenced is given up, and a suit too the final success of which was involved in some doubt.

The plaintiff might sustain a detriment by giving up all claim in respect of the expenses incurred, and the defendant might derive a benefit by having that suit put an end to, without further trouble or investigation. Now I am of opinion that the giving up of a suit instituted for the purpose of trying a doubtful question, and consenting to deliver up the ship, which might otherwise have been detained until the security required was given, is a good consideration to support a promise to pay a stipulated sum by way of damage, in case the actual damage amount to that sum. In Com. Dig., tit. Action upon the Case upon Assumpsit (F. 8), it is laid down that an action does not lie if a party promise in consideration of a surrender of a lease at will, for the lessor might determine it; unless there was a doubt whether it was a lease at will or for years; and 1 Rol. 23, l. 25, 35, and 1 Brownlow, 6, are cited. That is an authority to show that the giving up of a questionable right is a sufficient consideration to support a promise. Here, therefore, the giving up of a suit, instituted to try a question respecting which the law is doubtful, is a good consideration to support a promise. I think, therefore, that this action is sustainable.

BEST, J., concurred.

SMART v. CHELL.

IN THE QUEEN'S BENCH, TRINITY TERM, 1839.

[Reported in 7 Dowlings's Practice Cases, 781.]

Ryland and *Knowles* showed cause against a rule, obtained by *Petersdorff*, for arresting the judgment in the present case, on the ground that a sufficient consideration did not appear on the face of the declaration for the defendant's promise. The declaration stated that on the first day of October, 1837, the plaintiffs retained and employed the defendant, then being an attorney and solicitor, at his request and on his solicitation, as such attorney and solicitor, to prosecute and conduct a certain action on their behalf, on the terms and conditions that, in the event of his not getting his costs and charges in said action from the defendant therein, he would only charge such sum as he should be out of pocket in conducting said action; and the plaintiffs averred that the defendant, on the same day, commenced and prosecuted said action on the terms aforesaid; and thereupon, in consideration of the premises, and that the plaintiffs had promised the defendant, at his request, to allow him to receive, take, and retain such costs and charges as aforesaid and under the terms aforesaid, the defendant promised the plaintiffs to use due and proper care, diligence, and skill, as such attorney in prosecuting and conducting said action. The plaintiffs then assigned as a breach that, said action having been

commenced by arresting the defendant therein on a writ of *capias* issued out of the Court of Exchequer, no correct copy of said writ of *capias* was delivered to said last-mentioned defendant upon his said arrest; by reason whereof said writ of *capias* and all other proceedings in said action were set aside by a rule of said Court of Exchequer on the 1st of November following, with costs to be paid by the plaintiffs; whereupon and whereby the plaintiffs were forced to pay and did pay to the defendant in said action the sum of 14*l.*, the amount of said costs; "of all which said several premises the defendant then had notice, to wit, on the day and year last aforesaid, and then in consideration of the premises promised the plaintiffs to pay them half the said costs," to wit, the sum of 7*l.*, on request; yet the defendant hath not paid said sum or any part thereof, though requested so to do.¹

On the face of this pleading sufficient consideration was stated. A detriment to the plaintiff was alleged in consequence of the defendant's negligence. For half this detriment the defendant was alleged to have agreed to pay the plaintiff. Had the plaintiff commenced an action for the negligence against the defendant, the forbearance of that suit would be sufficient consideration for the defendant's promise. In substance the consideration alleged here was such a forbearance. In *Longridge and Others v. Dorville* it was held that, if a party gave up a suit instituted to try a question respecting which the law is doubtful, it is a good consideration for a promise to pay a stipulated sum. Here there was no kind of doubt as to the right of the plaintiff to sue the defendant for his negligence. Under these circumstances the present rule ought to be discharged.

Petersdorff, in support of the rule, contended that no sufficient consideration, moving from the plaintiff to the defendant, was alleged on the face of this declaration. Consistently with any of the allegations here, the plaintiff might immediately bring his action to recover the remaining 7*l.* out of the 14*l.*, which was the amount alleged to have been paid by the plaintiff in consequence of the defendant's negligence. The case might have been different if it had been alleged that [the defendant's promise was made] in consideration of the plaintiff relinquishing his claim for the remainder of the 14*l.*, which he had been obliged to pay through the negligence of the defendant, or in consideration that the plaintiff would not sue him for his negligence. No such allegation, however, was introduced. The declaration merely substituted one remedy for another.

Curr. adv. vult.

COLERIDGE, J. Several points were raised on arguing this case, but the only one on which I shall give an opinion is that in arrest of judgment. The declaration is singular. It is in assumpsit; and it states that the defendant was an attorney, and that he agreed to conduct certain actions on certain terms, and that he did accordingly

¹ See *supra*, p. 225, note 1. — Ed.

prosecute an action, and that in consideration of the premises he promised the plaintiffs to use due and proper care, skill, and diligence, as such attorney, in conducting the action. Here, one would have thought, was a sufficient promise alleged; and the declaration goes on and assigns a breach, and specifies what the exact failure was in properly conducting the cause, namely, that through the negligence of the defendant the writ of *capias* was set aside with costs, and that the plaintiff was thereby forced to pay 14*l.* for those costs. Now I should have thought that that was stated by way of special damage; but the declaration then goes on to state another promise, that in consideration of the premises the defendant promised to pay half the amount of those costs, and alleged a breach by non-payment of the 7*l.* Now no rule is more clear in law than that the consideration for a promise must move from the plaintiff: then I must see what this plaintiff has done or suffered, or what the defendant has gained; the detriment to the plaintiff must be the immediate consideration for the promises alleged. Suppose an assault had been committed, and an action of assumpsit was brought for non-payment of a sum of money agreed to be given for the injury done, and the declaration did not state a release of action for the assault. It is not therefore enough that there should be a collateral consideration for the promise, but there must be an immediate consideration. In this case the consideration stated is, that for the loss of 14*l.* by the plaintiff, through the defendant's neglect, the defendant promised to pay 7*l.*; but there is nothing to show that the plaintiff may not sue for the whole 14*l.* the very next day. There is consequently no sufficient consideration alleged, and the judgment must be arrested.

Rule absolute accordingly.

EDWARDS v. BAUGH.

IN THE EXCHEQUER, MAY 31, 1843.

[*Reported in 11 Meeson & Welsby, 641.*]

ASSUMPSIT. The declaration stated that before and at the time of the making of the promise by the defendant hereinafter in this count mentioned, to wit, on, &c., certain disputes and controversies were pending between the plaintiff and defendant, as to whether or not the defendant was indebted to the plaintiff in, to wit, the sum of 173*l.* 2*s.* 3*d.*, for money before then lent to and paid for the defendant by the plaintiff, at his request, and for interest upon and for the forbearance by the plaintiff, at the defendant's request, of moneys before due and owing from the defendant to the plaintiff for divers long spaces of time elapsed, and for money found to be due from the defendant to

the plaintiff on an account then stated between them; and thereupon heretofore, to wit, on the day and year last aforesaid, in consideration that the plaintiff, at the request of the defendant, would then promise the defendant not to sue the defendant at any time thereafter for the recovery of the said sum of, to wit, 173*l.* 2*s.* 3*d.*, so in dispute between the plaintiff and defendant as aforesaid, or any part thereof, or any damages in respect thereof, and would then accept of and from the defendant the sum of, to wit, 100*l.* in full satisfaction and discharge of the same, and every part thereof, and all damages in respect thereof, he the defendant then promised the plaintiff to pay him, to wit, the sum of 100*l.*, within a reasonable time then next following, in such satisfaction and discharge; and the plaintiff avers that he, confiding in the said promise of the defendant, did then promise the defendant not to sue the defendant at any time thereafter for the recovery of the said sum of, to wit, 173*l.* 2*s.* 3*d.*, so in dispute between the plaintiff and defendant as aforesaid, or any part thereof, or any damages in respect thereof, and that he would then accept of and from the defendant the sum of, to wit, 100*l.*, in full satisfaction and discharge of the same and every part thereof, and all damages in respect thereof: and although a reasonable time from the time of the making of the promise by the defendant, to wit, the day and year last aforesaid, had elapsed long before the commencement of this suit, to wit, on the day and year last aforesaid, of which the defendant then had notice; and although the plaintiff hath at all times, from the making of the promise by the defendant in this count mentioned to the commencement of this suit, been ready and willing to accept the said sum of, to wit, 100*l.* of and from the defendant, in such full satisfaction and discharge as aforesaid, of which the defendant hath always had notice; and although the plaintiff hath not at any time sued the defendant for or in respect of the said sum of, to wit, 173*l.* 2*s.* 3*d.*, or any part thereof, or any damages in respect thereof, &c., yet, &c.: — [Breach: non-payment by the defendant of the said sum of 100*l.*, or any part thereof.]

General demurrer, and joinder in demurrer.

The defendant's points marked for argument were: That there is no sufficient consideration for the defendant's promise; either, first, in respect of the forbearance to sue, because, although forbearance to sue when there is a well-founded claim, or the giving up of a suit actually commenced where the claim is fairly litigable, may be a sufficient consideration for such a promise, the declaration here neither shews that there was a debt or claim which could have been enforced, nor that the plaintiff had commenced an action, or taken any step to enforce it, or was even intending to do so; nor, secondly, in respect of the promise of the plaintiff to take 100*l.* in satisfaction, because it does not appear that any thing was owing from the defendant to the plaintiff, much less that more was owing, or that there was any fair or reasonable doubt whether more was owing or not; that there was consequently, so far as appears, neither benefit to the defendant nor detriment to the plaintiff.

The defendant will also contend that the promise of the plaintiff not to sue and to take 100*l.* in satisfaction was not binding upon him, being an agreement to accept a less sum in satisfaction of a greater.

The plaintiff's points were: That the declaration discloses a sufficient consideration to support the promise laid therein, inasmuch as the avoiding litigation by a settlement of claims of right in controversy is a sufficient consideration to support a promise; and that it makes no difference that the count shows, as the consideration for the promise of the defendant therein laid, a promise by the plaintiff partly executory, as a promise binding upon a plaintiff is in law a sufficient consideration to support a promise by a defendant.

Kelly, in support of the demurrer. The declaration is bad. It states no sufficient consideration for the defendant's promise to pay the 100*l.*; for it does not show that any debt was due from the defendant to the plaintiff, or that any suit was pending, the termination of which would be a benefit to the defendant or any detriment to the plaintiff. An undertaking not to sue, or forbearance to sue, is no consideration, where there is no legal demand or cause of action. It is not sufficient that disputes and differences existed between the plaintiff and defendant, for such an allegation would be satisfied by proof that the plaintiff made an unfounded claim which the defendant wholly denied. There is nothing to show that the plaintiff was entitled to maintain any action whatever. The old cases establish that the forbearance of a suit, where the party is not liable, is not a good consideration. *Tooley v. Windham*,¹ *King v. Hobbs*.² That doctrine was first broken in upon in *Longridge v. Dorville*, where it was held that the giving up a suit, instituted to try a question respecting which the law is doubtful, is a good consideration for a promise to pay a stipulated sum. But that case is very distinguishable; for there a suit had been actually instituted for the purpose of trying a doubtful question, and a ship had been delivered up which might otherwise have been detained. But *Holroyd, J.*, there says: "If a person is about to sue another for a debt for which he is not answerable, the mere consideration of forbearance is not sufficient to render him liable." Here no suit has been instituted, and no liability is shewn. It is not even stated that the plaintiff had any reason at all to believe that he had a cause of action against the defendant. Besides, the acceptance of 100*l.* would be no satisfaction for a claim of 173*l.* 2*s.* 3*d.*, if that were really due.

J. Henderson, contra. The consideration alleged is sufficient. The circumstance of an action being brought or not makes no difference. If there be a *bona fide* claim, which is forborne to be put in suit at the request of the defendant, that is enough. The allegation here in substance is, that the plaintiff had made a claim against the defendant for a certain amount, which the latter had denied to be due, and thus a dispute existed between them; and the defendant agreed, in considera-

¹ Cro. Eliz. 206.

² Yelv. 26.

tion that the plaintiff would forego his claim for 173*l.* 2*s.* 3*d.*, to pay him a definite sum of money of a smaller amount. Had the declaration averred that the defendant was actually indebted to the plaintiff in 173*l.* 2*s.* 3*d.*, and that the plaintiff had agreed to take 100*l.* in satisfaction of that larger sum, it would have been bad on the face of it. The abandonment of the right to sue for the unascertained amount is a good consideration for the promise. [LORD ABINGER, C. B. That may be true where the question is only as to the amount of a debt; but must not the existence of some actual debt be shown, as a foundation for the promise?] It is submitted that, there being a claim, and it being doubtful what is the amount due, or even whether any thing is due, that is enough. In *Wilkinson v. Byers*, where an action was pending for an unliquidated demand, the defendant's agreeing to pay a fixed sum in lieu of the plaintiff's claim was held a good consideration for the plaintiff to stay proceedings and pay his own costs. [LORD ABINGER, C. B. There an action had been brought, and there was a good consideration for the plaintiff's agreeing to discontinue it. ROLFE, B. Is not the plaintiff bound to show that there are at least reasonable grounds for believing that something is due to him from the defendant?] The parties have here constituted themselves the judges whether there was any thing due or not, and the legality of a claim to some amount is admitted by their agreement. The relinquishment by the plaintiff of his right, and a corresponding benefit derived by the defendant thereby, is a sufficient consideration.

Kelly, in reply, was stopped by the Court.

LORD ABINGER, C. B. The question in this case is, whether there is on the face of this declaration a good consideration for the promise alleged; and I am of opinion that there is not. Mr. Henderson has treated the words used in the declaration as if they implied that a reasonable doubt existed between the parties as to the existence of a debt due from the defendant to the plaintiff; but the declaration does not show, either expressly or by implication, any thing of that kind; it only alleges that certain disputes and controversies were pending between the plaintiff and the defendant, whether the defendant was indebted to the plaintiff in a certain sum of money. There is nothing in the use of the word "controversy" to render this a good allegation of consideration. The controversy merely is, that the plaintiff claims the debt, and the other denies it. The case might have been different, if the declaration had said, "whereas the defendant was indebted to the plaintiff in divers sums of money for money lent, and also on an account stated;" that a dispute arose as to the amount of the debt so due; and, in order to put an end to all controversies respecting it, it was agreed that the plaintiff, in consideration of receiving 100*l.*, should not sue the defendant in respect of his original claim. In that case the plaintiff would have been bound to prove at the trial the existence of a debt to some amount; he might not indeed be bound to prove the full amount, but simply to show such a claim as to lay a reasonable

ground for the defendant's making the promise ; whereas, in the present case, he would not have to prove any thing beyond the fact that there had been a dispute between himself and the defendant as to the existence of a debt. A man may threaten to bring an action against any stranger he may happen to meet in the street. Where an action is depending, the forbearing to prosecute it is a sufficient consideration for a promise to pay a certain sum of money ; for, besides other advantages, the party promising would save the extra costs which he would have to pay even if he were successful.

GURNEY, B., concurred.

ROLFE, B. I am of the same opinion. Mr. Henderson lays down the proposition much too broadly,—that if a party forbears to do something which he might have done, that forbearance would be a good consideration for a promise ; so that, if it had appeared on the face of the declaration that nothing was due to the plaintiff, his forbearance to sue would even then be a consideration. I cannot subscribe to that. I think the plaintiff is bound to show a consideration, in the shape of something either beneficial to the opposite party or detrimental to himself.

Judgment for the defendant.

LLEWELLYN v. LLEWELLYN.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1845.

[Reported in 3 Dowling & Lowndes' Practice Cases, 318.]

ASSUMPSIT. The first count of the declaration stated that, whereas heretofore, to wit, on the twenty-third day of June, in the year of our Lord 1837, there had been and then were divers accounts between the plaintiff and the defendant, which accounts were open and unsettled ; and there were then divers disputes between the plaintiff and the defendant touching and concerning the said accounts ; and the plaintiff then claimed of the defendant that the defendant was indebted to the plaintiff in divers large sums of money, amounting together to the sum of, to wit, 500*l.* ; and the defendant then claimed of the plaintiff, that he the plaintiff was indebted to the defendant ; and thereupon it was then agreed, by and between the plaintiff and defendant, that they should respectively give up their respective claims each upon the other ; and thereupon, in consideration thereof, and that the plaintiff at the request of the defendant would give up, relinquish, and forbear to prosecute, to and against him the defendant. all claims and demands whatsoever which he the plaintiff then had upon or against the defendant, he the defendant then promised the plaintiff to pay him, the plaintiff, during the lifetime of him the said plaintiff, a certain yearly sum of, to wit, 6*l.*, at and upon, to wit, the twenty-third day of June, in each and

every year during the lifetime of him the said plaintiff; and the plaintiff avers, that although he hath performed all things by him to be done in pursuance of the said agreement and of his said promise, and hath given up, relinquished, and ceased and forborne to prosecute against the defendant the said claims and demands of him the plaintiff in that behalf, yet the defendant, disregarding his said promise, hath not paid to the plaintiff the said yearly sum of 6*l.* or any part thereof, but hath hitherto wholly neglected and refused so to do; and on the contrary thereof, a large sum of money, to wit, the sum of 6*l.*, of the said yearly sums of money for one year ending on a certain day, to wit, on the twenty-third day of June, in the year of our Lord 1842, and then last elapsed, then became and was and now is due and in arrear, and unpaid from the defendant to the plaintiff, contrary to the said promise.

The defendant pleaded the general issue.

At the trial, which took place on the 29th of last April, before the under-sheriff of Breconshire, a verdict was returned for the plaintiff, with leave to the defendant to move to enter a nonsuit, on the ground that there was no such [sufficient?] consideration stated in the declaration.

A rule *nisi* had been accordingly obtained to arrest the judgment, or for a nonsuit, or a new trial.

Peacock now showed cause. It is submitted that this declaration discloses a sufficient consideration for the defendant's promise. It is stated in the inducement, which is admitted on the record, that there had been and then were divers accounts open and unsettled between the plaintiff and the defendant, and that the plaintiff claimed divers sums from the defendant, and that, in consideration thereof, and that the plaintiff at the request of the defendant would forbear to prosecute against the defendant these claims, the defendant made the promise stated in the declaration. That is a sufficient consideration, and the case differs from one where the only consideration is the foregoing of disputes and controversies as to whether any sum is owing between the parties. Here it appears that there have been accounts between the parties which remain unsettled, and that the plaintiff claimed certain sums from the defendant. The allegation that the plaintiff claimed certain sums from the defendant, taken in conjunction with the statement that there were accounts unsettled between the parties, is equivalent to an allegation by the plaintiff that a debt was due from the defendant to him. If so, then the giving up the claim in respect of that debt is a sufficient consideration for the promise.

E. V. Williams, in support of the rule. Whatever doubt may have formerly existed on this subject, it is now sufficiently clear that the mere giving up a claim to a debt, without showing that a debt exists, is not a sufficient consideration on which to found an assumpsit. In *Longridge v. Dorville* it was held that the giving up a suit instituted to try a question respecting which the law is doubtful is a good con

sideration for a promise to pay a stipulated sum. But there a suit was actually pending, and the plaintiff might have sustained some detriment by giving up all claim in respect of the expenses incurred, and the defendant have derived some benefit by having that suit put an end to without further trouble or investigation. Here, however, there is no allegation of the existence of a debt, but only that the plaintiff "claimed" a debt as owing to him. That a party "claims" a debt, raises no presumption that the money is owing to him. The claim may be perfectly unfounded. It is true that it is alleged that there were accounts open and unsettled between the parties, but it does not say which party was debtor. The plaintiff therefore may have been the debtor to the defendant; and if so, his claim against the defendant could not be rested on the state of the accounts between the parties. There is, however, a case which is very much in point with the present. In *Edwards v. Baugh* the declaration alleged that certain disputes and controversies were pending between the plaintiff and the defendant, whether the defendant was indebted to the plaintiff in a certain sum of money; and it was held upon demurrer, that it disclosed no sufficient consideration on which to maintain the action; and Lord Abinger, C. B., in delivering judgment, drew the distinction between foregoing a dispute as to the existence of a debt, and foregoing a dispute as to the amount of it. The true rule is, as is laid down by Rolfe, B., in the same case, that "the plaintiff is bound to shew a consideration, in the shape of something either beneficial to the opposite party or detrimental to himself." Here there is nothing beneficial to the defendant, for the claim may have been unfounded; nothing detrimental to the plaintiff, for the giving up an unfounded claim could have been no injury to him.

Peacock referred to the case of *Smith v. Monteith*.

Cur. adv. vult.

PATTESON, J. This case appears to me to be very distinguishable from that of *Edwards v. Baugh*, upon the authority of which the learned counsel for the defendant relied. There the declaration merely stated that disputes existed between the plaintiff and defendant whether the defendant was indebted to the plaintiff; which might be true, although they might have been entire strangers to each other, and never have had any transactions together. If so, the ending of such disputes could neither be detrimental to the plaintiff nor beneficial to the defendant. Here, on the contrary, the declaration states as a substantive fact, which might have been traversed by the defendant, that there had been and were mutual accounts between the plaintiff and defendant, which were open and unsettled. It then states in substance that each party claimed the balance, and that it was agreed that each party should withdraw his claim, and that the defendant should pay the plaintiff an annuity of 6*l.* for his life. It then states that, in consideration that the plaintiff would withdraw his claim, the defend-

ant promised to pay the annuity. Here is a plain detriment to the plaintiff in foregoing his claim to the balance; a claim which was not made against a stranger, but which had a probable foundation arising from mutual accounts between the parties, which are admitted to have been open and unsettled.

Under these circumstances I am of opinion that a valid consideration for the defendant's promise appears on the face of this declaration, and that the rule obtained in this case must be discharged.

Rule discharged

SMYTH v. HOLMES.

IN THE EXCHEQUER, NOVEMBER 12 AND 17, 1846.

[*Reported in 10 Jurist, 862.*]

ASSUMPSIT. The declaration set forth an indenture made between the plaintiff and defendant, by which certain matters in difference between them were referred to an arbitrator; the indenture providing, *inter alia*, that the costs incident to said reference and to the preparation of said indenture, and of all proceedings relative to the same, should be in the discretion of the arbitrator. The declaration then averred that the arbitrator took upon himself the burden of the arbitration, and having been attended on the 11th of February, 1845, by the respective solicitors of the parties, and having heard the said solicitors as well as the respective counsel of the said parties, it was thereupon, with the approbation of the said arbitrator, agreed by and between the plaintiff and defendant in manner following: that is to say, that the sum of 200*l.* should forthwith be paid by the defendant to and accepted by the plaintiff, in full satisfaction of all claims and demands of the plaintiff in respect to the several matters so referred, &c.; and that each of them, the plaintiff and defendant, should abide by and pay his own costs of the reference, &c., and of the said indenture, and of all the proceedings under the same. The declaration then averred mutual promises to fulfil the last-mentioned agreement, and alleged as a breach the non-performance of it by the defendant. General demurrer.¹

Martin, in support of the demurrer. The declaration discloses no cause of action against the defendant. It shows in substance that certain matters in difference between the plaintiff and defendant having been referred to arbitration, the parties, in the presence of the arbitrator, agreed that a sum of 200*l.* should be paid by the defendant to the plaintiff in satisfaction of his claim against him, and that each party should pay his own costs of the reference. Now, that is a mere accord;

¹ See, *supra*, p. 225, note 1. — ED.

and it is an established principle that an action will not lie on an accord unless satisfaction be shown. *Peytoe's Case*, 9 Co. 77*b*; *Allen v. Harris*, 1 Ld. Raym. 122; 1 Rol. Abr. 128, tit. Accord; *Case v. Barber*, T. Jones, 158; Vin. Abr., Accord (A.), pl. 11; *Lynn v. Bruce*, 2 H. Black. 317; *James v. David*, 5 T. R. 143, per Grose, J. *Edwards v. Baugh*, 11 Mee. & W. 641, comes very near the present case. [POLLOCK, C. B. In that case Lord Abinger says: "Where an action is depending, the forbearance to prosecute it is a sufficient consideration for a promise to pay a certain sum of money; for, besides other advantages, the party promising would save the extra costs which he would have to pay even if he were successful."] That was an extrajudicial opinion. [PARKE, B. There, there was no new consideration, but merely an agreement to do something in discharge of an existing debt; here part of the consideration is, that the parties will abandon a previous unexecuted agreement, by putting an end to which each of them gets some immediate advantage.] There is no real distinction between the present benefit of putting a stop to the proceedings before an arbitrator, and the paying down a sum of money. [He also cited *Wilkinson v. Byers*, 1 Adol. & Ell. 106; and POLLOCK, C. B., referred to the judgment of Holroyd, J., in *Longridge v. Dorville*, 5 B. & A. 117.]

Cowling, who appeared to support the declaration, was stopped by the Court.

POLLOCK, C. B. This is an action brought to recover a sum of money which the defendant promised to pay to the plaintiff. There had been an agreement to refer certain matters in difference; and if the doctrine of accord and satisfaction applied to this case at all, some doubt might have arisen in consequence of the observation of Lord Abinger in *Edwards v. Baugh*, 11 Mee. & W. 641. But the present is a case where parties agree to abandon a reference, and so far is distinguishable from a mere action brought by A. against B. When before the arbitrator, they entered into a mutual agreement to abandon the reference and the contingent right to the costs of it, and agreed that one should pay to the other a sum of money in satisfaction of his claim. It is very difficult to distinguish an agreement that one shall pay a sum of money on such a consideration as this from any other consideration that is good in law. Here was an agreement to refer certain matters to arbitration, and that arbitration, if proceeded with, might have ended more disadvantageously for the defendant than the agreement; as, for example, the award might be that he should pay the costs of the reference. The plaintiff, in consideration of the defendant promising to pay a sum of money, agrees to forego his right to the chance of an award that the defendant should pay those costs; and the defendant, on entering into such a bargain, agrees to pay money on a consideration which is good in law. Our judgment therefore must be for the plaintiff.

PARKE, B. I am of the same opinion. If this had been an action brought on an accord only, the authorities cited by Mr. Martin, namely,

1 Rol. Abr. 128, *Lynn v. Bruce*, in the Court of Common Pleas, and the rest, would be decisive on the point, that no action can be supported on a mere accord. But here we have more than a mere accord, for there is an agreement between these parties to discharge each other from an agreement of reference; and such an agreement before breach of the original agreement is binding. Here then the plaintiff agrees to abandon the reference, and discharge the defendant from his promise to refer the matter originally in difference. That is enough to show this action maintainable, for an action will lie on mutual promises; and this is such an action, and not an action on an accord.

ALDERSON and ROLFE, BB., concurred.

*Judgment for the plaintiff.*¹

HENDERSON AND OTHERS, *Official Managers of the North of England Joint-Stock Banking Company*, v. STOBART.

IN THE EXCHEQUER, FEBRUARY 9, 1850.

[*Reported in 5 Exchequer Reports, 99.*]

ASSUMPSIT by the official managers of the North of England Joint-Stock Banking Company for winding up the said company. The declaration stated that before the making of the promise, &c., one G. Burdis had been public officer of the said company; and that an action had been commenced by Burdis against one F. Todd and W. Todd for the recovery of the amount of a bill of exchange drawn by F. Todd and W. Todd upon the owners of the Trindon Colliery, and accepted by the defendant for himself and the other owners of the colliery, for 1,250*l.*, and indorsed to the Banking Company; that, whilst the action was so pending, it was agreed between the Banking Company, W. Todd, F. Todd, and the defendant, that the action should be settled as follows: 250*l.* by the promissory note of W. Todd and F. Todd; 500*l.* by the promissory note of W. Todd and F. Todd; and 500*l.* to be paid by the defendant's promissory note of 500*l.* at twelve months; the defendant consenting to the North of England Banking Company appropriating the securities held by them to the payment of such balance, and the defendant agreeing to give them a power to sell the properties mentioned in the securities; the company to forego all interest on receiving the three notes, and to guarantee to give up the bill sued on, and the 1,000*l.* bill received on account of the said bill. The declaration then stated mutual promises, and averred that, although the Banking Company had performed all things in the said agreement on their part to be performed, and had always been ready and willing

¹ See *Davis v. Spencer*, 24 N. Y. 386, 390. — ED.

to settle the said action, and to forego all interest on receiving the three notes, and to guarantee to give up the bill sued on, and the 1,000*l.* bill received on account of the said bill, yet the defendant did not nor would give to the Banking Company such promissory note for 500*l.*, nor such power of sale, &c.

Pleas: First, *non assumpsit*; Secondly, that it was not agreed between the Banking Company, W. Todd, F. Todd, and the defendant, *modo et formâ*.¹

A rule *nisi* having been obtained to arrest the judgment on a verdict in favor of the plaintiffs,

Martin and *Hugh Hill* showed cause. . . . It is conceded that no action will lie upon an accord unexecuted. *Lynn v. Bruce*, *Reniger v. Fogossa*.² But this declaration does not state that which merely amounts to an accord, for the company are to give up something besides the action. An accord is an agreement between the parties to the original contract, but here the defendant was no party to the action. This is a new agreement, which, if carried out, would prevent the company from proceeding with the action. The general averment of performance by the company of their promises is good after verdict. *Varley v. Manton*,³ *Kemble v. Mills*.⁴ Mere forbearance is a sufficient consideration to support an agreement. In Com. Dig., Action upon the Case upon Assumpsit (B. 2), in treating of what will be a good consideration, it is said, "So in consideration of surceasing his suit, for that is a benefit to the defendant, and a prejudice to the plaintiff, though the action is not discharged." This is tantamount to an agreement by the company to forbear their suit, which they have done on the faith of the defendant being a party to the agreement. The other debtors signed the agreement as well as the defendant, and it would be a fraud on them, if he were not bound by it. *Good v. Cheesman*⁵ shows that an accord with mutual promises is binding, though unexecuted. In *Wilkinson v. Byers* it was held that the payment by the defendant of an agreed sum, in discharge of an action for an unliquidated demand, was a good consideration for a promise by the plaintiff to stay proceedings and pay his own costs; and *Littledale, J.*, expressed an opinion that such an agreement would be binding, even in the case of a liquidated demand, on the authority of *Reynolds v. Pinhowe*. [PARKE, B. That was in effect an accord executed.] This is not like the cases of *Tattersall v. Parkinson*⁶ and *Down v. Hatcher*,⁷ where the defence set up was the payment of a less sum in satisfaction of a greater; but it comes within the principle of the decision in *Sibree v. Tripp*.⁸ [They also referred to *Smyth v. Holmes*.]

Knowes and *Unthank*, in support of the rule. This agreement is a

¹ A third plea and other parts of the case, having no reference to the question of "Consideration," have been omitted. — Ed.

² Plowd. 6.

³ 9 Bing. 363.

⁴ 1 M. & G. 757.

⁵ 2 B. & Ad. 328.

⁶ 16 M. & W. 752.

⁷ 10 A. & E. 121.

⁸ 15 M. & W. 23.

mere accord, and had no effect in putting an end to the original action. *Good v. Cheesman* proceeded on the ground that the agreement amounted to a valid new contract between the other creditors and the debtor, capable of being immediately enforced. The test in these cases is, whether the parties intended to accept the agreement as a satisfaction, or the performance of it. This declaration in terms alleges a performance, but is accompanied with language which shows that the agreement has not been performed; for it is averred that the company were "ready and willing to settle the action," &c. It is plain, therefore, that the parties did not rely upon the agreement, but upon the performance of it; and that distinguishes the case from those cited, and brings it within the rule that an accord unexecuted is no satisfaction. *Carter v. Wormald*.¹ This agreement could not have been pleaded in bar of the original action, if it had been proceeded with. *Flockton v. Hall*,² *Bayley v. Homan*.³ [PARKE, B. There is a new party to the agreement; it is as if the company had said to the defendant, "If you will become a party, and pay us 500*l.*, we will agree to stay proceedings in the action."] *Ford v. Beech* ⁴ decided that there can be no suspension of a right of action. . . .

PARKE, B. The rule must be discharged. We are satisfied that this is an agreement which would have been broken if the company had gone on with the original action; for, a new person being made a party to the contract, it becomes a binding engagement, and not a mere accord. . . .

ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

Rule discharged.

CROWTHER AND OTHERS v. FARRER.

IN THE QUEEN'S BENCH, JUNE 10, 1850.

[*Reported in 15 Queen's Bench Reports, 677.*]

ASSUMPSIT. The declaration stated that at the time of the making of the promise two actions, one in trover and the other in trespass, both at the suit of the present plaintiffs against the present defendant, were pending in the Queen's Bench; and thereupon it was agreed by and between the plaintiffs and the defendant in manner following, that is to say: that the said actions should be settled, and all proceedings therein stayed, and that the defendant should pay to the plaintiffs 40*l.* in respect of the costs of the said two actions, and also 236*l.* 9*s.* in part of damages; and that the plaintiffs should receive from certain other persons, to wit, J. B. and J. P., 263*l.* 11*s.*; but in the event of J.

¹ 1 Exch. 81.

³ 3 Bing. N. C. 915.

² 19 L. J., Q. B., 1.

⁴ 11 Q. B. 852.

B. and J. P. neglecting or refusing to pay to the plaintiffs that amount, or in the event of J. B. and J. P. giving up their contract with the defendant,¹ then, and in either of such cases, the defendant should pay to the plaintiffs what might remain unpaid to them of such sum of 263*l.* 11*s.*, in which case the defendant should be entitled to get the 1,506 square yards of stone¹ in the said agreement mentioned, or to sell it as he might think proper, in the same manner as though a certain agreement of 1835 had never been made.¹ Averment of mutual promises: "and, although the plaintiffs have always performed the said agreement on their part, and although they, confiding in the said promise of the defendant, did then, to wit, upon the making of the said promise, wholly cease to prosecute the said actions and each of them, and have thence continually hitherto stayed all proceedings therein, and although a reasonable time for the defendant to pay the said sums of 40*l.* and 236*l.* 9*s.* had elapsed long before the commencement of this suit." Breach: non-payment of these sums, or either of them, or any part thereof.

Plea: *Non assumpsit*. Issue thereon.

On the trial before Patteson, J., at the York Summer Assizes, 1849, it appeared that a contract to the effect set out in the count was made between the plaintiffs and the attorneys of the defendant. The main contest was, whether or not there was sufficient evidence of authority on their part to bind the defendant. The learned judge reserved leave to move to enter a nonsuit if there was no such evidence, and left the case to the jury. Verdict for plaintiffs.

Knowles, in Michaelmas Term last, obtained a rule *nisi* to enter a nonsuit, pursuant to the leave reserved, or to arrest the judgment. On this day cause was shown.

It appeared, by the judge's notes, that there was evidence of an express ratification of the contract by the defendant; and the rule to enter a nonsuit was discharged on that ground. The argument relating to that portion of the rule is omitted.

Martin and Hugh Hill, as to the rule for arresting judgment. The rule has been obtained on the supposition that this is an action on a mere accord. But it is an action on an agreement in consideration of forbearance of suit, which is more than a mere accord unexecuted. The reason why an action shall not lie on a mere executory accord (or, as it is there called, concord), is fully explained in *Reniger v. Fogossa*.² The mere executory concord which does not prevent the plaintiff from proceeding with his action is without consideration. But, when there is consideration for the agreement, an action will lie, though the agreement is an accord. In Com. Dig., Action on the Case upon Assumpsit (B. 1), it is said: "A promise in consideration of the forbearance of a suit is good; for that is for the benefit of the defendant, though the

¹ The declaration did not state any thing further on this subject.

² Plowden, 1, 5, 6.

action is not discharged." In the present case there is much more consideration than in that put by Comyns; for the actions are by the agreement actually settled, so that the plaintiffs could not afterwards have proceeded with them. *Cartwright v. Cooke*,¹ *Wilkinson v. Byers*. It is sufficient, however, that there should be any consideration. *Henderson v. Stobart* is much in point.

Knowles and Tomlinson, contra. [LORD CAMPBELL, C. J. If the plaintiffs, at the request of the defendant, made a contract which they would break if they proceeded with the actions, is not that alone a consideration to support the defendant's promise?] Such is not the meaning of the agreement; the plaintiffs do not agree to stay the actions unless they are paid the money: it is a mere accord. And, if the construction of the agreement was that the actions should be stayed by a binding release on the plaintiffs' part, there is no averment of performance.

LORD CAMPBELL, C. J. The motion in arrest of judgment is made on two grounds: first, that the declaration discloses no consideration for the defendant's promise; secondly, that there are not proper averments of performance of conditions precedent. Now, as to the first objection, the count states that it was agreed between the plaintiffs and defendant that the two actions should be settled, and all proceedings therein stayed. The question is not what would form a good plea in bar to the further maintenance of these actions, but whether this is a good consideration for the defendant's agreement. Is it not an advantage to the promisor, and a disadvantage to the promisee, that two actions against the one at the suit of the other should be settled, and no proceedings taken therein? Then there is a general averment of performance, which after verdict is abundantly sufficient, though it might be bad on special demurrer; but the count goes farther, and alleges performance more particularly. I think, however, that the agreement does not contemplate that any further act should be done to settle these actions. It appears that, by those who framed the agreement, they were considered as settled by the agreement itself; and, I think, rightly; for they were so settled. I cannot entertain any doubt that, if, after such an agreement, an attempt were made to proceed in the actions, the court would interfere summarily if the defendant was not in default.

PATTESON, J. The question is raised, whether on the face of this declaration there is any thing more than an accord. Now I own I think the meaning of what is stated in the declaration is that the actions are actually gone by the agreement, and that the plaintiff could not have gone on with them; but, even if it was no more than an agreement on the part of the plaintiffs to refrain from going on, I think that was a sufficient consideration to support the promise of the defendant.

COLERIDGE, J. It seems to me that the declaration discloses a mutual agreement, binding each party to the other, supposing that other to have performed his own part. I had more doubt as to the sufficiency of the averment of performance. Perhaps on a special demurrer it might not be sufficient: but this is after verdict; and then it is enough that there is an averment of the plaintiffs having always performed the agreement on their part.

ERLE, J. I shall only add one word as to the averment of performance. I take it that, when the plaintiffs and the defendant agree that the actions are settled, the very agreement puts an end to the actions; that the court would interfere if they were afterwards proceeded with; and that consequently no further performance of the agreement is required.

Rule discharged.

NASH, *Administrator with the Will annexed of JOHN BEATSON, deceased,*
v. ARMSTRONG.

IN THE COMMON PLEAS, MAY 11, 1861.

[*Reported in 10 Common Bench Reports, New Series, 259.*]

THE declaration stated that, by deed dated the 29th of February, 1860, the said John Beatson, being then possessed thereof for a term which had not yet expired, let to the defendant certain rooms, part of a house of the said John Beatson, therein described, from the 1st of March in that year to the 24th of June in that year, at rent to be ascertained by two valuers, one on the part of the said John Beatson, and one on the part of the defendant, or an umpire to be agreed on by the said two valuers, such rent to include the use of the fixtures and fittings then in and upon the said demised premises, and which then belonged to the said John Beatson, the expense of the valuer to be employed by the said John Beatson to be paid in the first instance by the defendant, and retained by him out of the rent for the said demised premises accruing due from him on the said 24th of June, 1860; and afterwards the said valuers were respectively accordingly duly appointed, but did not, without any default of the said John Beatson or the plaintiff in that behalf, ascertain the rent so to be paid as aforesaid, or appoint any umpire; and the defendant nevertheless, at his request, occupied the said rooms under the said demise until the said 24th of June, and afterwards as tenant thereof to the plaintiff as administrator as aforesaid, for a long time, to wit, until the 1st of September, 1860, the said John Beatson having previously died; that afterwards, and whilst the amount of rent to be paid by the defendant for and in respect of his said occupation of the said rooms to the said 24th of June, and thence to the said 1st of September, was and remained

unascertained and not agreed upon, and unpaid, it was, at the defendant's request, mutually agreed between the plaintiff as administrator as aforesaid and the defendant, that, if the plaintiff as administrator as aforesaid would not insist upon such valuation as aforesaid, and would not require that the said valuers should be called upon to appoint an umpire to ascertain the amount of the said rent to be paid for the defendant's said occupation until the said 24th of June, and the said valuers should be instructed not to appoint such umpire as aforesaid, the defendant would pay to the plaintiff as administrator as aforesaid, for and in respect of his occupation of the said rooms under the said deed, and for and in respect of the said subsequent occupation thereof as tenant to the plaintiff as administrator as aforesaid, a reasonable sum in that behalf, to wit, the sum of 70*l.*; and that neither the plaintiff as administrator as aforesaid, nor the defendant, should ever call upon the other of them to carry out or perform or fulfil the terms of the said deed. Averment: that the plaintiff did every thing, and every thing existed and had before suit happened to entitle the plaintiff, as administrator as aforesaid, to payment of the said sum of money last mentioned, to wit, 70*l.* Breach: that no part thereof had been paid.

To this count the defendant demurred, the ground of demurrer stated in the margin being, "that a contract under seal cannot be varied or discharged by a parol agreement." Joinder.

R. G. Williams, in support of the demurrer.¹ There is no valid consideration for the promise stated in the declaration. [WILLIAMS, J. Why is it not a good consideration in assumpsit that the plaintiff foregoes his rights under the deed?] It is varying by parol the terms of a deed. [WILLIAMS, J. That is not so.] By the parol agreement, the defendant is to pay the rent ascertained in a way different from that provided by the deed. [WILLIAMS, J. The plaintiff is seeking to enforce an agreement founded upon a consideration that the plaintiff will not put in force his rights under the deed.] A deed can only be varied by deed. Would a recovery in this action be pleadable in bar to an action upon the deed? [WILLES, J. I should

¹ The points marked for argument on the part of the defendant were as follows:—

"1. That the plaintiff by the first count is seeking to recover upon a deed as varied by a parol agreement, whereas a deed can only be varied by a deed;

"2. That the alleged agreement could be carried out by deed only, and there is no allegation of the execution of any such deed;

"3. That the matters alleged in the first count disclose a claim which can be enforced only in equity, and not at law;

"4. That there is no consideration for the alleged agreement, if it is to be considered as independent of the deed;

"5. That the alleged agreement would afford no answer to an action upon the deed, or prevent the plaintiff from calling upon the valuers to appoint an umpire, or upon the defendant to carry out the terms of the deed, and the consideration for it is wholly nugatory;

"6. That the alleged agreement is in the nature of an accord only, and cannot be enforced or sued upon."

have thought it a good answer by way of equitable plea. The payment of the 70*l.* under the agreement would surely be ground for an unconditional perpetual injunction against proceeding upon the deed.] The declaration, it is submitted, must be treated as it would have been before equitable pleas were known. Most of the cases upon this subject are cases where the parol agreement is set up as an answer to an action on the deed; but the grounds of the decision in *White v. Parkin*, 12 East, 578, are strongly in favor of the proposition contended for here.¹ . . . In the present case, it cannot be contended that the parol agreement does not conflict with the deed. There is an utter repugnance between the two instruments. In the course of the argument in *White v. Parkin*, a case of *Leslie v. De la Torre* was cited, where Lord Kenyon ruled that, the agreement by charter-party being under seal, the plaintiff could not set up a parol agreement inconsistent with it, and which in effect was meant in a certain extent to alter it. [WILLIAMS, J. The difficulty in your way is, that there is here an undertaking on the plaintiff's part to forbear from enforcing the payment of rent under the deed.] A rent would be payable under the deed, to which this agreement would be no answer. *White v. Parkin*² was cited and approved of in *Thompson v. Brown*, 7 Taunt. 656, 672.³ . . . A deed cannot be varied in any way by parol; and no action can be maintained on a parol agreement which varies the deed. In the case of a contract for the sale of goods within the 17th section of the Statute of Frauds, where another day for payment has been by parol substituted for that originally fixed by the contract, it has been held that the subsequent parol agreement cannot be made the foundation of an action. *Marshall v. Lynn*, 6 M. & W. 109; *Mechelen v. Wallace*, 7 Ad. & E. 49, 2 N. & P. 224; *Stead v. Dawber*, 10 Ad. & E. 57. In Chitty on Contracts, 6th edit. 55, it is said: "If there be an entire consideration for the defendant's promise, made up of several particulars, and one of these consist of an agreement by the defendant which the Statute of Frauds requires to be in writing, and which for want of such writing is void, the whole consideration is void, and the promise cannot be supported." Here, there would be nothing to prevent the plaintiff from bringing an action upon the deed, even after the money was paid under the agreement. To allow this declaration to be good would be promoting circuity of action.

Raymond, for the plaintiff, was not called upon.⁴

¹ The learned counsel here stated that case. — ED.

² *Leslie v. De la Torre*?

³ The learned counsel here stated the case of *Gwynne v. Davy*, 1 M. & G. 857, 2 Scott, N. R. 29, 9 Dowl. P. C. 1. — ED.

⁴ The points marked for argument on the part of the plaintiff were as follows: —

"1. That the contract disclosed by the first count does not infringe upon the rule that a contract under seal cannot be varied by parol agreement;

"2. That, although a contract under seal cannot be varied by parol, yet it is competent to the parties to enter into a fresh agreement by parol, and for a good consideration, not to put in force the original contract;

WILLIAMS, J. I am of opinion that there should be judgment for the plaintiff on this demurrer. I do not think it necessary to dispute the correctness of many of the doctrines contended for in the argument; for I do not consider that the conclusion we have arrived at in any degree conflicts with any of the rules of law adverted to. On the face of this declaration there is an admitted promise by the defendant to pay a certain sum of money at a stipulated time, and an admitted breach of that promise. That is a perfectly good promise if founded upon a sufficient legal consideration; and the simple question is, whether there is a sufficient legal consideration disclosed on the declaration. I am of opinion that there is. It appears upon the face of the declaration that the plaintiff, as the personal representative of the original contracting party, being in a condition to bring an action upon the original contract, or otherwise to put it in force, in consideration of his abstaining from enforcing the rights conferred on him by that contract, the defendant promised to pay in respect of the occupation of the premises under the deed referred to, and in respect of his subsequent occupation thereof as tenant to the plaintiff as administrator, a reasonable sum. It was not necessary, in order to make that a good consideration, that the mutual promises should amount to a release of the right of action flowing from the original contract. The plaintiff, having a right to enforce the benefits conferred on him by the contract, enters into an agreement not to do so, whereby he changes his situation to this extent, that, whereas before he had a right to sue upon the deed, if he now exercises that right he renders himself liable to an action. He has therefore plainly given a good consideration for the defendant's promise, and there is a complete cause of action disclosed on the face of the declaration. Upon principle, this is in truth nothing more than the ordinary case to be found in the old books, of an action against an heir whose ancestor has made a bond binding himself and his heirs, and who has assets by descent; if he contracts with the obligee of the bond that, if the latter will forbear to put the bond in suit, he will pay the sum secured by a given day, — that is a good assumpsit, and the forbearance till the day named is a good consideration to support the promise. The bond is not released by that. The only result is, to subject the obligee to an action if he puts the bond in suit before the expiration of the time agreed on. To that extent the terms of the bond are varied, and yet the bond remains unreleased; nevertheless, the consideration which flows from the agreement of the obligee not to put the bond in suit is good, and furnishes a ground of action if it be broken. That principle is applicable here.

WILLES, J. I am entirely of the same opinion. It appears to me

"3. That the contract declared on is collateral to that entered into by the deed, and leaves the force of the deed itself intact, and amounts merely to an agreement not to enforce the performance of the original contract under seal;

"4. That such new contract is founded upon a good consideration, and is therefore valid."

that this declaration is neither open to the objection that it is an attempt to vary by parol the terms of a deed, nor to the objection that it is an action upon an accord.

BYLES, J. I had at first some doubt whether the maxim *unumquodque dissolvitur eodem ligamine quo ligatur* was not applicable here; for, till satisfaction, the plaintiff might always have an action upon the deed, and one cannot but see that this would lead to circuitry of action. Further, whatever may be the value of the decision in *Leslie v. De la Torre*, the reported observations of Lord Kenyon are very much in favor of Mr. Williams's argument. But *Gwynne v. Davy* is not so. Three of the judges there intimate an opinion that an action might be maintained on the parol agreement. And no other authorities have been cited to show that the rule is applicable to a cross-action, and is not confined to an action on the deed.

KEATING, J. I concur with the rest of the Court in thinking that the declaration discloses a promise founded on a good consideration, and that it is not open to the objection that the plaintiff is seeking by parol to vary the terms of an instrument under seal.

Judgment for the plaintiff.

COOK AND OTHERS v. WRIGHT.

IN THE QUEEN'S BENCH, JULY 9, 1861.

[*Reported in 1 Best & Smith, 559.*]

DECLARATION by the plaintiffs, as payees, against the defendant, as maker of two promissory notes, dated the 7th February, 1856. The first count was upon a note for 10*l.* 10*s.*, payable twelve months after date; the second was upon a note for 11*l.*, payable twenty-four months after date. There was also a count upon an account stated. Claim, 50*l.*¹

First plea, to the whole declaration: That, after the passing and coming into operation of the Whitechapel Improvement Act, 1853, and after the passing and coming into operation of The Metropolis Local Management Act, 1855, the defendant made the several promissory notes in the said first and second counts mentioned at the request of the plaintiffs; and that, at the time of making the said promissory notes, the plaintiffs asserted and represented to the defendant, and the defendant believed such assertion and representation to be true, that there was then due and owing and payable from him, the defendant, as the owner of certain lands and buildings in certain streets called Finch

¹ The suit was commenced in the Whitechapel County Court of Middlesex, and was removed by *certiorari* into this court.

Street, John Street, and Dowson's Place, situate within the parish of St. Mary, Whitechapel, to the trustees of the parish of St. Mary, Whitechapel, under the provisions of The Whitechapel Improvement Act, 1853, divers large sums of money in respect of paving the streets fronting, adjoining, and abutting on such lands and buildings. And the defendant says that, at the time of making the said promissory notes, no sum of money whatsoever was due, or owing, or payable, from the defendant as such owner to the said trustees, nor was the defendant such owner as aforesaid; and that there never was any consideration or value for the defendant's making the said promissory notes in the first and second counts mentioned, or either of them, or for his paying the same, or any part thereof; and the plaintiffs never were, nor was any person ever a holder of the said notes or either of them for value or consideration; and that the account stated, in the declaration mentioned, was stated of and concerning the matters and things in this plea mentioned, and not of or concerning any other matter or thing whatsoever.

Second plea, to the first and second counts: That the defendant was induced to make, and did make, the promissory notes in those counts mentioned, and each of them, by the fraud, covin, and misrepresentation of the plaintiffs and others in collusion with them.

On the trial, before Wightman, J., at the sittings in London during Easter Term, 1860, it appeared that the plaintiffs were four of the commissioners or trustees acting under and incorporated by § 27 of The Whitechapel Improvement Act, 1853, 16 & 17 Vict. c. cxli.; and the action was brought to recover the amount of the two notes mentioned in the declaration. The evidence as to what took place at the time of the giving of the notes was as follows: Mitchell, the clerk to the trustees, said that, certain parts of the district not being in repair in 1854, notices to do repairs were sent or left addressed to the owners; and in October, 1855, he wrote a letter to the defendant, demanding 70*l.* for expenses incurred by the trustees in doing paving works in front of houses, of which the defendant was the owner or occupier, situate in and abutting on public highways within the district of The Whitechapel Improvement Act. The defendant complained that the works done by the trustees had seriously injured the property, and that the tenants were dissatisfied, and requested him to get an abatement made. He informed the defendant that the trustees assented, and the balance to be paid by the defendant was agreed to at 30*l.*; the defendant then requested time, and time was given, upon condition that he paid interest; and three promissory notes were given by the defendant, the first of which was paid by him under protest. The defendant was called, and stated that Mrs. Bennett was owner of the three houses in question, and that he was tenant of one of them at a rack-rent under her, and collected the rents of the others for her; that he paid the paving rate of the house which he occupied, and the paving rates of the other houses he paid for Mrs. Bennett and in her name; that, upon

receiving the notice of October, 1855, he went before the Board of Trustees and told them that he was not the owner of the property, and showed them Mrs. Bennett's receipts for the rent. They replied that, as he paid the rates, they considered he was the owner within the meaning of The Whitechapel Improvement Act, 1853, and, if he did not give notes, they would serve him as they had served Goble, which was by levying an execution on him; that there was another case in which the question of the liability of the inhabitants was to be tried, and, if decided against the trustees, he should not be called on to pay. When the first note became due he complained to Mitchell that the trustees had not carried out their promise to try one of the cases. Mitchell said that, as the defendant had signed the notes, he must pay them, and that the promised trial should take place; thereupon the defendant paid the first note. The defendant was afterwards told by Mrs. Bennett that he was not the owner within the meaning of the act, and he thereupon went to a board meeting of the trustees and told them that he would not pay the other notes. It was contended for the defendant that the notes were given without consideration, the defendant not being an "owner" within § 7 of The Whitechapel Improvement Act. The jury, in answer to questions put to them by the learned judge, found that the defendant told Mitchell or the Board, before he gave the notes, that he was not the owner; that the defendant mentioned, before he gave the notes, that Mrs. Bennett was the owner; and that Mitchell or some member of the Board told the defendant in the board-room that, unless he gave the notes, he would be served as Goble had been. The verdict was thereupon entered for the defendant, leave being reserved to move to enter a verdict for the plaintiffs. In the same Term, May 4,

Montagu Chambers obtained a rule to show cause accordingly, on the ground that the evidence did not prove want of consideration for giving the notes, and that upon the evidence the plaintiffs were entitled to a verdict.

This rule was argued in this Term, May 23d, before COCKBURN, C. J., WIGHTMAN, CROMPTON, and BLACKBURN, JJ.

Shee, Serjt., and *Barnard* showed cause. There was no consideration for the notes. The defendant signed them upon the representation by the trustees that they considered him the owner of the houses, because he collected the rents and was liable to pay the rates. But the defendant was not the owner within § 7 of Stat. 16 & 17 Vict. c. cxli., by which "the word 'owner,' used with reference to any lands or buildings in respect of which any work is required to be done, or any rate to be paid under this act, shall mean the person for the time being entitled to receive, or who, if such lands or buildings were let to a tenant at rack-rent, would be entitled to receive, the rack-rent from the occupier thereof."

The existence of disputes and controversies between a plaintiff and defendant, as to whether the defendant is indebted to the plaintiff, is

not a sufficient consideration for a promise: there must be a debt in existence. *Edwards v. Baugh*. These notes were not given for the debt of another party: the trustees did not profess to take them in payment of the rates due from Mrs. Bennett. [CROMPTON, J. Suppose money had been paid by the defendant, could he have recovered it back? The maxim *quod fieri non debet factum valet* seems to apply. WIGHTMAN, J., referred to *Southall v. Rigg*, and *Forman v. Wright*.¹] In Addison on Contracts, p. 15, 4th ed., it is said: "So, if the consideration prove to be a nullity, the promise founded upon it is void, as if the consideration be the forbearance of a suit when there is no cause of action. . . . or a promise to pay a debt which never had an existence in point of law."

Hannen, in support of the rule. 1. The plea was not proved. The defendant did not believe the representation of the trustees that he was liable as owner of the houses under the provisions of The Whitechapel Improvement Act, 1853.

2. The plea is not good. In *Edwards v. Baugh* the defendant might have been imposed upon as to there being a debt due from him to the plaintiff, but in this case there is no statement that the defendant yielded to the assertion that he was owner of the houses; it amounts to no more than that he thought it doubtful whether he was liable. [CROMPTON, J. Did the trustees put themselves in a worse position by taking the notes? Might they not the next day have said, "We have mistaken our position," and have returned the notes?] No. In *Baker v. Walker*,² Parke, B., said (p. 467), "If I give a promissory note for the debt of a third person, I am bound to pay it when due." [CROMPTON, J. The defendant gave the note in discharge of his own liability: he took the debt upon himself, whosoever it was, if the trustees would give him time.] The defendant signed the notes because the trustees threatened to sue him, not because he believed himself to be liable; and he obtained time for payment of the debt of a third person, which is a sufficient consideration for giving the notes. *Sowerby v. Butcher*.³ Suppose the trustees had sued Mrs. Bennett for the rates, she might have pleaded that the trustees had taken notes for the amount from her agent. The notes were given for the debt claimed to be due in respect of a particular property. [COCKBURN, C. J. The difficulty which I feel is that I do not see in what character the defendant acted when he gave the notes.⁴ . . .]

Cur. adv. vult.

BLACKBURN, J. (July 9th), delivered the judgment of COCKBURN, C. J., WIGHTMAN, J., and himself; CROMPTON, J., having left the court before the argument was concluded.

In this case it appeared on the trial that the defendant was agent for a Mrs. Bennett, who was a non-resident owner of houses in a district subject to a local act. Works had been done in the adjoining street by the commissioners for executing the act, the expenses of which,

¹ 11 C. B. 481.

² 14 M. & W. 465.

³ 2 Cr. & M. 368.

⁴ Wightman, J., here read from 16 & 17 Vict. c. cxli. — Ed.

under the provisions of their act, they charged on the owners of the adjoining houses. Notice had been given to the defendant, as if he had himself been owner of the houses, calling on him to pay the proportion chargeable in respect of them. He attended at a board meeting of the commissioners, and objected both to the amount and nature of the charge, and also stated that he was not the owner of the houses, and that Mrs. Bennett was. He was told that, if he did not pay, he would be treated as one Goble had been. It appeared that Goble had refused to pay a sum charged against him as owner of some houses, and the commissioners had taken legal proceedings against him, and he had then submitted and paid, with costs. In the result it was agreed between the commissioners and the defendant that the amount charged upon him should be reduced, and that time should be given to pay it in three instalments; he gave three promissory notes for the three instalments; the first was duly honored; the others were not, and were the subject of the present action. At the trial it appeared that the defendant was not in fact owner of the houses. As agent for the owner he was not personally liable under the act. In point of law, therefore, the commissioners were not entitled to claim the money from him; but no case of deceit was alleged against them. It must be taken that the commissioners honestly believed that the defendant was personally liable, and really intended to take legal proceedings against him, as they had done against Goble. The defendant, according to his own evidence, never believed that he was liable in law, but signed the notes in order to avoid being sued as Goble was. Under these circumstances the substantial question reserved (irrespective of the form of the plea) was whether there was any consideration for the notes. We are of opinion that there was.

There is no doubt that a bill or note given in consideration of what is supposed to be a debt is without consideration, if it appears that there was a mistake in fact as to the existence of the debt; *Bell v. Gardiner*; ¹ and, according to the cases of *Southall v. Rigg* and *Forman v. Wright*, the law is the same if the bill or note is given in consequence of a mistake of law as to the existence of the debt. But here there was no mistake on the part of the defendant either of law or fact. What he did was not merely the making an erroneous account stated, or promising to pay a debt for which he mistakingly believed himself liable. It appeared on the evidence that he believed himself not to be liable; but he knew that the plaintiffs thought him liable, and would sue him if he did not pay, and in order to avoid the expense and trouble of legal proceedings against himself he agreed to compromise; and the question is, whether a person who has given a note as a compromise of a claim honestly made on him, and which but for that compromise would have been at once brought to a legal decision, can resist the payment of the note on the ground that the original claim thus compromised might have been successfully resisted.

¹ 4 M. & Gr. 11.

If the suit had been actually commenced, the point would have been concluded by authority. In *Longridge v. Dorville* it was held that the compromise of a suit instituted to try a doubtful question of law was a sufficient consideration for a promise. In *Atlee v. Backhouse*,¹ where the plaintiff's goods had been seized by the excise, and he had afterwards entered into an agreement with the commissioners of excise that all proceedings should be terminated, the goods delivered up to the plaintiff, and a sum of money paid by him to the commissioners, Parke, B., rests his judgment, p. 650, on the ground that this agreement of compromise honestly made was for consideration, and binding. In *Cooper v. Parker*² the Court of Exchequer Chamber held that the withdrawal of an untrue defence of infancy in a suit, with payment of costs, was a sufficient consideration for a promise to accept a smaller sum in satisfaction of a larger.

In these cases, however, litigation had been actually commenced; and it was argued before us that this made a difference in point of law, and that though, where a plaintiff has actually issued a writ against a defendant, a compromise honestly made is binding, yet the same compromise, if made before the writ actually issues, though the litigation is impending, is void. *Edwards v. Baugh* was relied upon as an authority for this proposition. But in that case Lord Abinger expressly bases his judgment (pp. 645, 646) on the assumption that the declaration did not, either expressly or impliedly, show that a reasonable doubt existed between the parties. It may be doubtful whether the declaration in that case ought not to have been construed as disclosing a compromise of a real *bona fide* claim, but it does not appear to have been so construed by the Court. We agree that unless there was a reasonable claim on the one side, which it was *bona fide* intended to pursue, there would be no ground for a compromise; but we cannot agree that (except as a test of the reality of the claim in fact) the issuing of a writ is essential to the validity of the compromise. The position of the parties must necessarily be altered in every case of compromise, so that, if the question is afterwards opened up, they cannot be replaced as they were before the compromise. The plaintiff may be in a less favorable position for renewing his litigation; he must be at an additional trouble and expense in again getting up his case, and he may no longer be able to produce the evidence which would have proved it originally. Besides, though he may not in point of law be bound to refrain from enforcing his rights against third persons during the continuance of the compromise, to which they are not parties, yet practically the effect of the compromise must be to prevent his doing so. For instance, in the present case, there can be no doubt that the practical effect of the compromise must have been to induce the commissioners to refrain from taking proceedings against Mrs. Bennett, the real owner of the houses, while the notes given by the defendant, her

¹ 3 M. & W. 633.

² 15 Com. B. 822.

agent, were running ; though the compromise might have afforded no ground of defence had such proceedings been resorted to.

It is this detriment to the party consenting to a compromise arising from the necessary alteration in his position which, in our opinion, forms the real consideration for the promise, and not the technical and almost illusory consideration arising from the extra costs of litigation. The real consideration therefore depends, not on the actual commencement of a suit, but on the reality of the claim made and the *bona fides* of the compromise.

In the present case we think there was sufficient consideration for the notes in the compromise made as it was.

The rule to enter a verdict for the plaintiff must be made absolute.

*Rule absolute.*¹

SECTION VII.

Moral Consideration.

EDMONDS' CASE.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1586.

[Reported in 3 Leonard, 164.]

IN an action upon the case against Edmonds, the case was, that the defendant, being within age, requested the plaintiff to be bounden for him to another for the payment of 30*l.*, which he was to borrow for his own use ; to which the plaintiff agreed, and was bounden, *ut supra*. Afterwards the plaintiff was sued for the said debt, and paid it. And afterwards, when the defendant came of full age, the plaintiff put him in mind of the matter aforesaid, and prayed that he might not be damaged so to pay 30*l.*, it being the defendant's debt : whereupon the defendant promised to pay the debt again to the plaintiff : upon which promise the action was brought. And it was holden by the Court that, although here was no present consideration upon which the assumpsit could arise, yet the court was clear that upon the whole matter the action did lie ; and judgment was given for the plaintiff.² •

¹ Compare *Oulds v. Harrison*, 10 Exch. 572, 577, per Parke, B. — Ed.

² In the report of the same case in Godb. 138, *nom.* Barton and Edmonds' Case, it is said : " But if a *feme covert* and another at her request had been bounden in such a bond, and after the death of her husband she had assumed to have saved the other harmless against such bond, such assumpsit should not have bound the wife." — Ed.

TREWINIAN v. HOWELL.

IN THE QUEEN'S BENCH, HILARY TERM, 1588.

[Reported in *Croke Elizabeth*, 91.]

ERROR of a judgment in assumpsit against the now plaintiff, as executor to T. Trewinian, his brother; in which Howell declared that, whereas the testator was indebted to him in a certain sum, the said Trewinian, the then defendant, did assume, that if he had goods sufficient, that he would pay him, and alleged that he had goods sufficient. Upon *non assumpsit*, it was found for the then plaintiff, who had judgment. Upon this, error was brought; and the principal error assigned was, that there is no sufficient consideration alleged; for the having of goods was no consideration; but in consideration he would forbear to sue, &c., this had been a good consideration. But it was said of the other party that, he being executor, his promise (he having assets) doth bind him, for he is in duty to pay it. *Daniel* said it was adjudged in one Hudson's Case, that a promise of the executor to pay a debt is binding if he hath assets, otherwise not. And so *Coke* said it was adjudged in Sir William Cook's Case that such a promise is good without any other consideration, if he hath assets of the testator in his hands, otherwise not; for the consideration is only by reason of the act and debt of the testator; and, therefore, shall bind me no further than the goods of the testator amount. Second error: that the judgment was general, and not *de bonis testatoris*, as it ought to be; for by such a general judgment, he shall be charged of his own goods. The Court said they would advise. But at another day (*absente WRAY*) it was adjudged the judgment should be affirmed; for it was a good assumpsit, and he shall be charged *de bonis propriis*, being of his own promise.

WATSON v. TURNER ET AL.

IN THE EXCHEQUER, TRINITY TERM, 1767.

[Reported in *Buller's Nisi Prius*, 129.]

AN action was brought by an apothecary against the overseers of a parish for the cure of a pauper, who boarded with her son out of the parish, under an agreement made with him by the defendant Turner, who was the only acting overseer of the parish. The pauper was suddenly taken ill, and her son called in the plaintiff, who had attended her for four months, and cured her. After the cure Turner was applied to, and promised to pay the plaintiff's bill. It was held, that

though there was no precedent request from the overseers, yet the promise was good, notwithstanding the Statute of Frauds; for overseers are under a moral obligation to provide for the poor. Secondly, that as Turner was the only acting overseer, the other was bound by his promise.¹

ATKINS ET UXOR v. HILL.

IN THE KING'S BENCH, EASTER TERM, 1775.

[Reported in Cowper, 284.]

IN assumpsit the plaintiffs declared against Charles Hill, being in the custody, &c.: For that whereas James Clarke, &c., by his last will, &c., did give and bequeath to the plaintiff's wife the sum of 60*l.*, &c., and of his last will and testament made the said Charles Hill sole executor, &c., and the said Charles Hill took upon himself the burthen and execution of the said will: And the said N. and A. further say that divers goods and chattels, &c., afterwards, &c., came to the hands of the said Charles Hill as executor of the said J. C., which said goods and chattels were more than sufficient to satisfy and pay all the just debts and legacies of the said J. C., &c., of which the said C. H. then and there had notice: By reason of which said premises, the said Charles Hill became liable to pay to the said N. and A. the said sum of 60*l.*; and, being so liable, he, the said C., in consideration thereof, afterwards, &c., undertook and faithfully promised to pay to them the said sum of 60*l.*, whenever, &c.

To this declaration the defendant demurred generally.

Mr. *Le Blanc*, in support of the demurrer.²

Mr. *Buller*, contra. for the plaintiff. The question is, whether the facts stated in this declaration, namely, that the defendant was executor and had assets, &c., are a sufficient consideration for a promise. As to that question, it is a settled point that, wherever an express promise is made upon a good consideration, an action lies. And the slightest ground is sufficient to maintain a promise. 1 Vent. 40, 41, *Wells v. Wells*; 1 Lev. 273. s. c.; *Stone v. Withipool*, Latch, 21, in which latter case it is laid down, "that it is an usual allegation for a rule, that any thing which is a ground for equity is a sufficient consideration."

But here an express promise is made, and by the demurrer admitted. It is objected, however, that there is no averment that the funeral expenses are paid. The answer is, it is averred that he had assets to pay, which is alone sufficient, and so it was expressly held by Lord

¹ See *Paynter v. Williams*, 1 Cr. & M. 810. — Ed.

² Only so much of the arguments and decision is here given as relates to the question of "Consideration." — Ed.

King, in the case of *Camden v. Turner*, *Sittings after Tr.*, 5 Geo. I., C. B.; *Select Cases of Evidence* by Sir John Strange.

LORD MANSFIELD. This is a case in which the declaration particularly states that assets have been received by the defendant, the executor, more than sufficient to pay all the testator's debts and legacies. If so, it most undoubtedly must be taken upon the pleadings that there was sufficient to discharge the funeral expenses, because they are payable first; consequently, if there was less than the amount of them, there could not be sufficient to discharge the debts and legacies. The declaration then goes on to state that, in consideration of there being full sufficient assets as aforesaid, the defendant undertook and promised to pay the plaintiff his legacy. No doubt then but, at any time after an executor has assented, the property vests; and if it be a pecuniary legacy, an action at law will lie for the recovery of it. Formerly, upon a bill being filed in chancery against an executor, one part of the prayer of it was, that he should assent to the bequests in his testator's will. If he had assets, he was bound to assent. And when he had assented, the legacy became a demand which in law and conscience he was liable to pay. But, in the present case, there is not only an assent to the legacy, but an actual promise and undertaking to pay it; and that promise founded on a good consideration in law, as appears from the cases cited by Mr. Buller, particularly the case of *Camden v. Turner*,¹ where acknowledgment by an executor, "that he had enough to pay," was held a sufficient ground to support an assumpsit. Here the defendant, by his demurrer, admits he had sufficient to pay; therefore this is not the case that Mr. Le Blanc has been arguing upon; but it is the case of a promise made upon a good and valuable consideration, which, in all cases, is a sufficient ground to support an action. It is so in cases of obligations which would otherwise only bind a man's conscience, and which, without such promise, he could not be compelled to pay. For instance, where an infant contracts debts during his minority; if after he comes of age he consents to pay them, an action lies. So a conveyance executed by an infant, which he was compellable to do by equity, is a good conveyance at law. *Co. Lit.*, Attornment, 315 *a*. In this case the promise is grounded upon a reasonable and conscientious consideration; namely, that the defendant had assets to discharge the legacy. If so, he was compellable in a court of equity, or in the ecclesiastical court, to pay it. I give my opinion upon this case as it stands; that is, that it is an express promise made upon a good and sufficient consideration.

The three other judges concurred.

Per Cur. Judgment for the plaintiff.

Mr. *Le Blanc* then moved for liberty to withdraw the demurrer, and plead the general issue; but the Court refused it.

¹ *Sittings after Trinity Term*, 5 Geo. I., C. B., *coram* King, C. J.

TRUEMAN v. FENTON.

IN THE KING'S BENCH, JANUARY 28, 1777.

[Reported in *Cowper*, 544.]

THIS was an action on a promissory note, bearing date the 11th February, 1775, payable to one Joseph Trueman (the plaintiff's brother), three months after date, for 67*l.*, and indorsed by him to the plaintiff.

The declaration contained other counts for goods sold, money had and received, and on an account stated. The defendant pleaded, first, *non assumpsit*; secondly, "that on the 19th January, 1775, he became bankrupt, and that the debt for which the said note was given was due to the plaintiff before such time as he, the defendant, became bankrupt, and that the note was given to Joseph Trueman for the use of, and for securing to, the said plaintiff his debt so due." The cause was tried before Lord Mansfield at the Sittings after Michaelmas Term, 1776, when the jury found a verdict for the plaintiff, damages 72*l.* 12*s.*, costs 40*s.*, subject to the opinion of the Court upon a special case, stating the answer of the plaintiff in this action to a bill filed against him in the Exchequer by the present defendant for a discovery of the consideration of the note; the substance of which was as follows: "That on the 15th of December, 1774, the defendant, Fenton, purchased a quantity of linen of the plaintiff, Trueman; and it being usual to abate 5*l.* per cent to persons of the defendant's trade, the price, after such abatement made, amounted to 126*l.* 18*s.* That at the time of the sale it was agreed that one-half of the purchase-money should be paid at the end of six weeks, and the other half at the end of two months: And in consideration thereof, the plaintiff, Trueman, drew two notes on the defendant for 63*l.* 9*s.* each, payable to his own order, at six weeks and two months respectively. That the defendant accepted the notes, and thereupon the plaintiff gave him a discharge for the sum. He then denied that he had proved or claimed any debt or sum of money under the commission; but set forth that he acquainted the defendant he was surprised at his ungenerous behavior in purchasing so large a quantity of linen of him at the eve of his bankruptcy, and informed him he had paid away the above two notes: upon which the defendant pressed him to take up the two notes, and proposed to give him a security for part of the debt. That afterwards, on the 11th February, 1775, the defendant called upon the plaintiff, and voluntarily proposed to secure to him the payment of 67*l.* in satisfaction of his debt, if he would take up the two notes and cancel or deliver them up to the defendant. That the plaintiff agreed to accept this proposal with the approbation of his attorney, and desired the note to be made payable to his brother, Joseph Trueman, or order, three months after date. That he took up the two acceptances and delivered them to the defend-

ant to be cancelled, and accepted the above note for 67*l.* in satisfaction and discharge thereof. That a commission of bankruptcy issued against the defendant on the 19th of January, 1775, and that the bankrupt obtained his certificate on the 17th of April following." The question reserved was, Whether the facts above stated supported the merits of the defendant's plea? If they did not, then a verdict was to be entered for the plaintiff on the general issue; but if the merits of the second plea supported the defendant's case, then a verdict was to be entered for the defendant on that plea.

Mr. *Buller*, for the plaintiff, argued that the note, though given after the bankruptcy, was in this case binding upon the defendant, and therefore the certificate was no bar to the present action. First: Because the goods, though sold before the bankruptcy, were sold on credit, and not to be paid for till a future day. Therefore, if no security at all had been given, the debt could not have been proved under the commission; because such a case does not fall within the provisions of Stat. 7 Geo. I., c. 31. If not, this is simply the case of a sale of goods on future credit, for which the vendor receives a note after the vendee is become bankrupt; because the two drafts drawn by the plaintiff on the defendant at the time of the sale, and accepted by the defendant, could not vary the agreement. It was still a sale on future credit, and no debt due till after the bankruptcy. Besides, they were afterwards delivered up. If no debt was due at the time of the bankruptcy, the merits of the plea are clearly not proved; for the merits are, that the debt was then due. Now it clearly was not due, and therefore the certificate was no bar to the demand. Secondly: Supposing it could be contended that there was any thing like a debt due before the bankruptcy, yet the plaintiff upon the facts stated is still entitled to recover upon the note in question. The consideration was for a fair *bona fide* debt, without any mixture of fraud or pretence of undue advantage by the plaintiff. On the contrary, there was a gross fraud on the part of the defendant, in obtaining the goods upon the eve of his becoming bankrupt; and the conviction of such his misconduct was the inducement with him to offer the security now in dispute. If he were to discharge the whole original debt, it would not be more than was due, and what in conscience he ought to pay. But here the plaintiff has agreed to accept much less than in conscience was due to him. If so, like every other debt which a man is bound in conscience to discharge, it is a good ground for raising an *assumpsit*. The slightest acknowledgment is sufficient to revive a debt barred by the Statute of Limitations. So, where a man after he comes of age promises to pay a debt contracted during his minority, *assumpsit* lies. As to the case of a promise by a bankrupt to pay a debt in consideration of a creditor's signing his certificate, that is made void by the Stat. 5 Geo. II., c. 30, sect. 11. But even that would have been a good ground of action before the statute; and it is the only exception made. The certificate, no doubt, is a pro-

vision for the benefit of the bankrupt. But he may waive it; and here he has waived it for a good and valuable consideration. If so, he is bound by the contract. In addition to this general reasoning, he cited the case of *Lewis v. Chase*, 1 P. Wms. 620, and *Barnardiston v. Copeland*, argued in the Common Pleas, in Hilary and Easter Terms, 1761, MSS.

Mr. *Davenport*, contra, for the defendant, contended that the plaintiff had no other remedy for his debt, but by resorting with the rest of the creditors to the commission. That the transaction, though colored over, was clearly intended as an evasion of the bankrupt laws, and therefore manifestly illegal. That the plaintiff's taking up the two drafts, and accepting another security short of his real debt, could in no respect be a new consideration to the defendant; because he was at all events discharged from them by his certificate. And as to the objection that the original debt itself was not within the Stat. 7 Geo. I., c. 31, and therefore could not have been proved under the commission, it clearly might, allowing a rebate of interest for the time of the credit given. That the question depended solely upon the construction of the bankrupt laws, and particularly the Stat. 5 Geo. II., c. 30, by which it was clear that, where such a promise or undertaking is made by a bankrupt before his certificate obtained, it is void. That any other construction would open a door to that collusion respecting the certificate which the statute meant to avoid, and at the same time be highly injurious to the bankrupt. Therefore he prayed judgment might be entered for the defendant.

LORD MANSFIELD. The plea put in, in this case, is that the debt was due at the time of the act of bankruptcy committed; and on that plea, in point of form, there was a strong objection made at the trial that the allegation was not strictly true; because at the time of the sale, credit was given to a future day; which day, as it appeared in evidence, was subsequent to the act of bankruptcy committed. To be sure, on the form of the plea, the defendant must fail. But I never like to entangle justice in matters of form, and to turn parties round upon frivolous objections where I can avoid it. It only tends to the ruin and destruction of both. I put it therefore to the counsel on the part of the plaintiff to give up the objection in point of form, and to take the opinion of the Court, whether, according to the facts and truth of the case, the defendant could have pleaded his certificate in bar of the debt in question; and in case they had refused to do so, I should have left it to the jury upon the merits. The counsel for the plaintiff very properly gave up the point of form. The question, therefore, upon the case reserved, is worded thus: Whether the facts support the merits of the defendant's plea? That is, Whether, on the merits of the case, properly pleaded, the certificate of the defendant would have been a bar to the plaintiff's action? Now, in this case there is no fraud, no oppression, no scheme whatsoever on the part of the plaintiff to deceive or impose on the defendant; and as to collusion with respect to the cer-

tificate, where a creditor exacts terms of his debtor as the consideration for signing his certificate, and obtains money or a part of his debt for so doing, the assignees may recover it back in an action. But that is not the case here. So far from it, the transaction itself excluded the plaintiff from having any thing to do with the certificate. No man can vote for or against the certificate till he has proved his debt. Here the plaintiff delivers up the two drafts bearing date prior to the act of bankruptcy, and by agreement accepts one for little more than half their amount, bearing date after the commission of bankruptcy sued out. Most clearly, therefore, he could not have proved that note under the commission; and if not, he could have nothing to do with the certificate. That brings it to the general question, Whether a bankrupt, after a commission of bankruptcy sued out, may not, in consideration of a debt due before the bankruptcy, and for which the creditor agrees to accept no dividend or benefit under the commission, make such creditor a satisfaction in part or for the whole of his debt, by a new undertaking and agreement? A bankrupt may undoubtedly contract new debts; therefore, if there is an objection to his reviving an old debt by a new promise, it must be founded upon the ground of its being *nudum pactum*. As to that, all the debts of a bankrupt are due in conscience, notwithstanding he has obtained his certificate; and there is no honest man who does not discharge them, if he afterwards has it in his power to do so. Though all legal remedy may be gone, the debts are clearly not extinguished in conscience. How far have the courts of equity gone upon these principles? Where a man devises his estate for payment of his debts, a court of equity says (and a court of law in a case properly before them would say the same): All debts barred by the Statute of Limitations shall come in and share the benefit of the devise, because they are due in conscience. Therefore, though barred by law, they shall be held to be revived and charged by the bequest. What was said in the argument relative to the reviving a promise at law, so as to take it out of the Statute of Limitations, is very true. The slightest acknowledgment has been held sufficient; as saying, "Prove your debt, and I will pay you,"—"I am ready to account, but nothing is due to you." And much slighter acknowledgments than these will take a debt out of the statute. So in the case of a man, who after he comes of age promises to pay for goods or other things, which during his minority one cannot say he has contracted for, because the law disables him from making any such contract, but which he has been fairly and honestly supplied with, and which were not merely to feed his extravagance, but reasonable for him (under his circumstances) to have; such promise shall be binding upon him, and make his former undertaking good. Let us see then what the transaction is in the present case. The bankrupt appears to me to have defrauded the plaintiff by drawing him in, on the eve of a bankruptcy, to sell him such a quantity of goods on credit. It was grossly dishonest in him to contract such a debt, at a

time when he must have known of his own insolvency, and which it is clear the plaintiff had not the smallest suspicion of, or he would not have given credit and a day of payment *in futuro*. On the other hand, what is the conduct of the plaintiff? He relinquishes all hope or chance of benefit from a dividend under the commission, by forbearing to prove his debt; gives up the securities he had received from the bankrupt, and accepts of a note, amounting to little more than half the real debt, in full satisfaction of his whole demand. Is that against conscience? Is it not on the contrary a fair consideration for the note in question? He might foresee prospects from the way of life the bankrupt was in, which might enable him to recover this part of his debt, and he takes his chance; for till then he could get nothing by the mere imprisonment of his person. He uses no threats, no menace, no oppression, no undue influence; but the proposal first moves from, and is the bankrupt's own voluntary request. The single question then is, Whether it is possible for the bankrupt, in part or for the whole, to revive the old debt? As to that, Mr. Justice Aston has suggested to me the authority of *Bailey v. Dillon*, where the Court would not hold to special bail, but thought reviving the old debt was a good consideration. The two cases cited by Mr. Buller are very material. *Lewis v. Chase*, 1 P. Wms. 620, is much stronger than this; for that smelt of the certificate; and the Lord Chancellor's reasoning goes fully to the present question. Then the case of *Barnardiston v. Coupland*, in C. B., is in point. Lord Chief Justice Willes there says, "that the revival of an old debt is a sufficient consideration." That determines the whole case. Therefore I am of opinion that, if the plea put in had been formally pleaded, the merits of the case would not have been sufficient to bar the plaintiff's demand.

ASTON, J. As a case of conscience, I am clearly of opinion that the plaintiff is entitled. Wherever a party waives his right to come in under the commission, it is a benefit to the rest of the creditors. In the case of *Bailey v. Dillon*, the Court on the last day of the Term were of opinion, "that the defendant could not be held to special bail, yet they would not say that he might [not?] revive the old debt which was clearly due in conscience." A bankrupt may be and is held to be discharged by his certificate from all debts due at the time of the commission; but still he may make himself liable by a new promise. If he could not, the provision in the Stat. 5 Geo. II., c. 30, sect. 11, by which every security for the payment of any debt due before the party became bankrupt, as a consideration to a creditor to sign his certificate, is made void, would be totally nugatory. — LORD MANSFIELD added that this observation was extremely forcible and strong.

Per Cur. Judgment for the plaintiff.

HAWKES ET UXOR v. SAUNDERS.

IN THE KING'S BENCH, JANUARY 28, 1782.

[Reported in Cowper, 289.]

THIS action was brought against the defendant in her own right; and the declaration stated that George Saunders by his will bequeathed a legacy of 50*l.* to the plaintiff; that he appointed the defendant his executrix; that she proved the will; that goods and chattels came to her hands more than sufficient to pay all the testator's debts and legacies, by reason whereof she became liable to pay the legacy, and being so liable, in consideration thereof she promised to pay it.

LORD MANSFIELD. This case does not at all involve in it the question whether a legatee has a general right to sue for a legacy in this court.

Two objections have been made: 1st, That there can be no judgment in this case *de bonis testatoris*; because the action is not brought against the defendant as executrix *eo nomine*, but is a personal demand against her generally in her own right. As to that, we are of opinion the objection is good; for the demand is certainly a personal demand against the defendant, in consequence of a promise made by her, she being executrix.

It is admitted at the bar, that after verdict it must be taken to have been a promise in writing, and that there were assets. If so, the whole case is reduced to this single point: Whether the circumstance of the defendant having assets sufficient to pay all the debts and legacies is or is not a sufficient consideration for her to make a promise to pay the legacy in question? As to that point, the rule laid down at the bar, as to what is or is not a good consideration in law, goes upon a very narrow ground indeed; namely, that to make a consideration to support an assumpsit, there must be either an immediate benefit to the party promising, or a loss to the person to whom the promise was made. I cannot agree to that being the only ground of consideration sufficient to raise an assumpsit.

Where a man is under a legal or equitable obligation to pay, the law implies a promise, though none was ever actually made. *A fortiori* a legal or equitable duty is a sufficient consideration for an actual promise. Where a man is under a moral obligation, which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration: as if a man promise to pay a just debt, the recovery of which is barred by the Statute of Limitations; or if a man after he comes of age promises to pay a meritorious debt contracted during his minority, but not for necessaries; or if a bankrupt, in affluent circumstances after his certificate, promises to pay the whole of his debts; or if a man promise to perform a secret trust, or a trust void for want of writing by the Statute of Frauds.

In such and many other instances, though the promise gives a compulsory remedy where there was none before either in law or equity, yet as the promise is only to do what an honest man ought to do, the ties of conscience upon an upright mind are a sufficient consideration. But an executor who has received assets is under every kind of obligation to pay a legacy. He receives the money by virtue of an office which he swears to execute duly. He receives the money as a trust or deposit to the use of the legatee. He ought to assent if he has assets. He has no discretion or election. He retains what belongs to the legatee, and therefore owes him to the amount.

An account of assets, or a judgment to pay out of assets, is only necessary when the sufficiency of assets is uncertain. Where the sufficiency of assets received is certain, the executor's duty to pay a legatee follows by necessary consequence.

The legacy in such a case is a demand clearly due from the executor upon various grounds of natural and civil justice, and may be recovered from him by process of law. In such a case a promise to pay stands upon the strongest consideration.

Let us see then what are the facts in the present case. The executrix knows the state of her testator's affairs, and of his property. It might consist of chattels which she might not choose to dispose of. It might consist of leases which she had no mind to sell; and having a full fund to pay the demand, which the plaintiff had a right to recover if he pleased, she, in consideration of that fund, promises to pay. I cannot think this is not a sufficient consideration. I am of opinion it is amply sufficient. It is not like the case of *Rann v. Hughes*; for there, there were no assets, nor any averment of assets stated in the declaration. But in this case there was a full fund; and therefore she was bound in law, justice, and conscience, to pay the plaintiff his legacy.

Mr. Justice WILLES and Mr. Justice ASHHURST were of the same opinion.

BULLER, J. I am entirely of the same opinion. That an action in the courts of Westminster Hall will, under some circumstances, lie for a legacy, is a question which I think can never admit of any serious doubt. For there are a number of cases in the books, from the time of Henry VI. to the present time, which prove that, under different circumstances, such action may be maintained. I think there is as little doubt but that the circumstances of the present case, as proved at the trial, were sufficient to sustain an action; for the legacy was to be paid out of land; and there was an express assent by the executrix to the legacy. But the evidence which was given at the trial is not now before the court. We are to decide this case upon the face of the record alone.

The plaintiff, in his declaration, has not stated that the legacy was payable out of land; neither has he stated any assent by the executrix.

The action is brought against the defendant in her own right; and

the declaration is simply that George Saunders by his will bequeathed a legacy to the plaintiff, and made the defendant executrix; that she proved the will, and had assets sufficient to pay all the debts and legacies; and by reason thereof she became liable to pay the legacy, and being so liable she promised to pay it.

To this declaration two objections have been made in arrest of judgment. 1st, That the defendant is not sufficiently described as executrix, and therefore there cannot be judgment *de bonis testatoris*. 2d, No judgment can be entered *de bonis propriis*, because there was no consideration for the promise; and therefore it is *nudum pactum*. As to the first, I am of opinion that the plaintiff cannot upon this declaration take judgment *de bonis testatoris*. The action is brought against the defendant in her own right, and not as executrix. It charges her with a personal promise to pay the legacy, and not upon a qualified promise to pay as executrix, or out of assets. And the plaintiff having by his declaration made a personal demand against her, he must stand or fall by that, and cannot now resort to any demand that he may have upon her in the particular character of executrix.

The forms of pleading are very different where a person is charged as executrix and where she is charged personally. In the first case, she is always named as executrix in the beginning of the declaration. She is afterwards stated to be liable as executrix, and the promise alleged to have been made by her as executrix. But, in the other case, she is charged generally as any other person; and a general charge is a personal charge.

This case, therefore, depends wholly upon the second question: whether there be a sufficient consideration alleged for the promise, or whether the defendant's promise be merely *nudum pactum* and void.

The consideration stated for the promise is, that the defendant was executrix, and that she had received assets more than sufficient to pay all the debts and legacies. The question is, whether that be not a sufficient consideration.

Under those circumstances, if there had been no promise, nor even an assent to the legacy, the defendant might have been compelled, in a court of equity, or in the ecclesiastical court, to have paid it. Whether without assent she could be compelled, in a court of law, to pay it or not, is a question which it is not necessary to give any opinion upon now: and, therefore, though I have endeavored to trace out the jurisdiction and the authority of the ecclesiastical court from the earliest times; and though there is great reason to suppose that the jurisdiction which that court now possesses in matters of legacy, was originally got by usurpation on the temporal courts; and though there is a wide difference between allowing to the ecclesiastical court a jurisdiction in such matters, and saying it shall have that jurisdiction exclusive of all other courts, I purposely avoid giving any opinion, or even hinting what would be the result of my researches, where there is no promise or assent.

I shall give my opinion singly on this point: Whether an obligation in justice, equity, and conscience, to pay a sum of money, be or be not a sufficient consideration in point of law to support a promise to pay that sum.

If such a question were stripped of all authorities, it would be resolved by inquiring whether law were a rule of justice, or whether it were something that acts in direct contradiction to justice, conscience, and equity. But the matter has been repeatedly decided.

In *Stone v. Withipool*, Latch. 21, the court say: "It is an usual allegation for a rule, that every thing which is a ground for equity is a sufficient consideration." So in *Wells v. Wells*, 1 Vent. 41, the Court presumed an equitable right in the plaintiff, which did not appear on the declaration; and held that to debar herself of that was a good consideration.

These authorities alone are sufficient to show that the ground taken in the argument at the bar is not large enough.

But to come closer to the consideration now in question, in *Camden v. Turner*, C. B., Sittings after Trin., 5 Geo. I., King, C. J., held that an action for money had and received lay against an executor for a legacy, which he had owned lay ready for the plaintiff whenever he would call for it. In that case, according to the form of the declaration, the objection did not appear upon the record; but it was necessary for the plaintiff to prove a consideration at the trial; and if he had not, he must have been nonsuited or have had a verdict against him. But Lord King held that his owning the money lay ready was an assent, and admission of assets, and a sufficient consideration.

In *Reech v. Kennegal*, 1 Vez. 125, Lord Hardwicke expressly holds that assets coming to an executor's hands is a sufficient consideration to support a promise; and he puts that case upon the same footing as a promise in consideration of forbearance. His Lordship says: "At law, if an executor promises to pay a debt of his testator's, a consideration must be alleged, as of assets come to his hands, or of forbearance; or if admission of assets is implied by the promise; otherwise it will be but *nudum pactum*, and not personally binding on the executor."

In *Trewinian v. Howell*, Cro. Eliz. 91, it was adjudged that having assets is a good consideration for a promise; and the judgment, which was *de bonis propriis*, was affirmed. And two other cases are there cited where the same point had been so determined. Lastly, the case of *Atkins v. Hill*, Easter, 15 Geo. III., is in point. The declaration was the same, and the objection the same, as in the present case; and the court unanimously held that the promise was good, and that the action well lay.

I agree with my Lord that the rule laid down at the bar, as to what is or is not a good consideration, is much too narrow. The true rule is, that wherever the defendant is under a moral obligation, or is liable in conscience and equity, to pay, that is a sufficient consideration. Some of the cases which I have mentioned go fully to that extent.

But even if the narrow rule which has been mentioned were adopted as the true rule, yet in this case, I think, the consideration is sufficient; for here is both a loss to the plaintiff and a benefit to the defendant, arising from that which is the consideration of the promise. The loss to the plaintiff is, that the effects which are liable to the payment of the legacy have not been so applied; but the defendant has detained them in her own hands for other purposes. The benefit to the defendant is, that she has received those effects, and has them still. The defendant is bound in conscience to apply the effects towards the discharge of the debts and legacies. She is a trustee for that purpose, and is guilty of a breach of trust in not so doing; and it is admitted that a breach of trust is a good ground for action.

Therefore I agree in opinion with the rest of the Court, that this rule in arrest of judgment ought to be discharged.

Per Cur. Rule discharged.

BARNES, DOWDING, AND BARTLEY, v. HEDLEY AND
CONWAY.

IN THE COMMON PLEAS, NOVEMBER 24, 1809.

[*Reported in 2 Taunton, 184.*]

THIS was an issue between the plaintiffs, who were the executors of William Webb, deceased, and the defendants, who were assignees under a commission of bankrupt which issued against William Harrè and Henry Suthmier, directed by order of the Lord Chancellor, in order to try whether the bankrupts on the 13th of August, 1802, were indebted to Webb in any and what sum of money. The trial came on at the Sittings in London, Mich. Term, 1808, before Mansfield, C. J., when a verdict was found for the plaintiffs for the sum of 11,672*l.* 4*s.* 2*d.* subject to the opinion of the Court on the following case: By a written agreement made on the 15th of May, 1800, between Webb and the bankrupts, the former agreed to advance money from time to time upon interest at 5 per cent. to Harrè and Suthmier, who carried on the business of sugar bakers in copartnership, in order to enable them to purchase raw sugars; and in consideration of such advances the bankrupts were also to pay to Webb a commission of 5 per cent. for all sugars which were to be bought of him, or provided for Messrs. Harrè and Suthmier; and in order to secure to Webb the balance which might become due to him on these transactions, Harrè and Suthmier executed and gave to him certain deeds and securities. Webb made out four several successive half-yearly accounts between him and Harrè and Suthmier, on the footing of this agreement, and various sums of money were paid to Webb on

these accounts from time to time by the bankrupts; these accounts closed on the 10th of August, 1802, when a considerable balance was due from the bankrupts to Webb. These accounts comprised the principal moneys actually advanced, and interest at 5 per cent.; and also 5 per cent. on all sugars purchased by the bankrupts. Webb never purchased or procured any sugars for the bankrupts; but the same were always purchased by the bankrupts themselves in their own names. It was admitted on the trial that the original agreement of the 15th of May, 1800, was illegal and usurious, and that no part of the balance could have been recovered by Webb from Harrè and Suthmier, if they had set up the usury; and Webb was informed by the attorney of Harrè and Suthmier in July, 1802, that these transactions were usurious, and that his whole debt was in danger of being lost, and a writ of *latitat* was actually sued out by the bankrupts' attorney upon the Statute of Usury; but this fact was unknown to Webb. In consequence of this intimation, it was agreed between Harrè and Suthmier and Webb, that Webb should make out fresh accounts, leaving out all the charges for commission; and should only charge them with the principal money, together with legal interest; and that the original deeds and articles in the possession of Webb should be given up by him and cancelled accordingly. Webb accordingly made out such fresh account, in which he omitted the whole charge for commission; and the balance due to him amounted to the sum of 11,672*l.* 4*s.* 2*d.*, which balance was composed of principal moneys actually advanced under the agreement of 15th May, 1800, and of interest at 5 per cent. fairly and legally calculated; the whole commission and every objectionable charge being omitted. This account, so corrected, was, on the 12th of August, 1802, delivered to the agent of Harrè and Suthmier, and on the following day they acknowledged this balance to be due to Webb, and promised to pay the same; whereupon the deeds and securities executed to Webb by Harrè and Suthmier, when the original agreement was entered into, were produced by Webb or his agent, in the presence of Harrè and Suthmier, and were then cancelled and burnt. The question for the opinion of the Court was, whether, under the circumstances of this case, the plaintiffs were entitled to recover the above balance of 11,672*l.* 4*s.* 2*d.* If the Court should be of that opinion, a verdict for such sum was to be entered for the plaintiffs; if otherwise, the verdict to be entered for the defendants.

This cause was twice argued: first, in Easter Term, 1809, by *Best*, Serjt., for the plaintiffs, and *Vaughan*, Serjt., for the defendants; and again in Trinity Term, 1809, by *Shepherd*, Serjt., for the plaintiffs, and *Lens*, Serjt., for the defendants.

Arguments for the plaintiffs. There are two questions in this case: first, Whether the promise that has been made to repay the sum lent, with legal interest, is avoided by the Statute of Usury;¹ secondly, Whether there was any good consideration to sustain the promise. . . .

¹ The arguments upon the first question are omitted. — Ed.

Secondly, there is a good consideration for the new promise; for the money has been actually received by the defendants, and there is a foundation in justice for the new contract. *Hill v. Atkins*, Cowp. 284. Lord Mansfield held that, when an executor had assented to a legacy, "it became a demand which in law and conscience he was liable to pay;" that it was a case of a promise made upon good and valuable consideration, which in all cases is sufficient ground to support an action. It is so in cases of obligations which would otherwise only bind a man's conscience, and which, without such promise, he could not be compelled to pay. For instance, where an infant contracts debts during his minority, if, after he comes of age, he consents to pay them, an action lies. So *Hawkes v. Saunders*, Cowp. 289, "A legal or equitable duty is a sufficient consideration for an actual promise." And though these cases have been since overruled, it has been on a ground which does not impeach this principle; namely, on the ground that the Court has not jurisdiction in case of legacies. Buller, J., says in the last case: "If such a question were stripped of all authority, it would be resolved by inquiring whether law were a rule of justice, or whether it were something that acts in direct contradiction to justice, conscience, and equity. But the matter has been repeatedly decided." *Trueman v. Fenton*, Cowp. 544. A promise to pay made by a bankrupt after obtaining his certificate revives the debt. That, notwithstanding a usurious security given, the money lent is a debt in equity and conscience, and ought to be repaid with legal interest, has long been acknowledged in courts of equity. 2 Ves. 567, the Lord Chancellor says: "The Court does not relieve against usurious contracts to make a man lose his principal as well as his legal interest." *Scott v. Nesbit*, 2 Bro. Ch. Ca. 649. Upon an application to set aside a judgment tainted with usury, it was held "that it could be displaced only by the plaintiff's doing what was just, and that it must stand for the money actually paid, with legal interest." Indeed the practice there is so well established, that if a bill, filed to set aside a usurious security, does not voluntarily offer to repay the principal and legal interest, it is cause of demurrer. The plaintiffs could not have had the original securities set aside in a court of equity, without offering these terms. This Court not long since, on setting aside an annuity in the case of *Burdon v. Browning*, 1 Taunt. 520, required the defendant to submit to the terms of repaying the principal and interest. [MANSFIELD, C. J. observed that this was always by agreement of the parties; that the Court had no power to prescribe the terms. LAWRENCE, J., observed that actions had been allowed to recover back the money, as paid without consideration: it was so held in *Shove v. Webb*, 1 Term Rep. 732.] And if it be objected that *Wright v. Wheeler*¹ was the case of a bond, for which no consideration needs to be shown, it is sufficient to say it was not decided on that ground, but on the sufficiency of the consid-

¹ 1 Campb. 165, n.

eration; and if there had not been a new consideration, the old consideration must have remained; which was illegal, and an illegal consideration would have avoided the bond, though no consideration was necessary. But there is another consideration for the present promise: the plaintiffs had deeds and securities for the money; it is true they were vitiated by the usury, but it might be uncertain whether the defendants could prove it, and unless for that proof the plaintiffs could enforce them; therefore the giving them up to be cancelled was a valuable consideration for the second contract.

Arguments for the defendants. . . . It is not contended, as the plaintiffs imagined it was, that the second contract is tainted with usury, but that there was no consideration for it; and in order to enforce a promise, it is not sufficient that a man has given it upon his judgment that some obligation lies on him: contracts purely voluntary are not enforced either in law or equity. Here no ground for the promise is shown, either of advantage to the maker or detriment to the other party. The old securities are not delivered up to be cancelled, but are actually destroyed, rather for the safety of the lender, against whom they would have been evidence to subject him to heavy penalties, than for the advantage of the borrower. This case, therefore, is distinguishable from the case cited of a bond, for which no consideration needs to be shown. Besides, the issue to be tried in *Wright v. Wheeler* upon the defendant's plea, was whether the usury was committed in giving that very bond; and the fact was against him. In overruling *Hill v. Atkins*, and *Hawkes v. Saunders*, as was done in 5 Term Rep. 690, *Deeks v. Strutt*, the Court at least determined that not every conscientious motive for a promise will support an action at law. [MANSFIELD, C. J. The overturning of those decisions did not touch any principle which applies to the present case; it went on the ground that the ecclesiastical court was the only legal place where to sue for a legacy; it is not enough as to a legacy that an executor has at one moment received money sufficient to pay it; but debts are to be paid according to their priority, and it is often necessary to refund: but the decision in *Deeks v. Strutt* had nothing to do with the general ground of conscience.] The cases of conscientious considerations which have been cited are not analogous. In the case of bankruptcy the certificate merely destroys the remedy, and leaves the bankrupt a free man: free to pay or not to pay at pleasure. But the legal debt extinguished by bankruptcy is neither *Malum prohibitum* nor *malum in se*; and for an illegal debt the debtor does not want the aid of a commission to relieve him from it. Here it is the intention of the statute not only totally to destroy the engagement, but to make usury an offence; and in order to deter persons from being guilty thereof, it meant that a sum of money once usuriously lent should never under any circumstances be repaid, although it was honestly due; and it would be a complete evasion of the statute, if a man who enters into a usurious contract may, when he fears the consequences, alter his contract, and defeat the pro-

visions of the act. [LAWRENCE, J., observed that, if the borrower should repay money usuriously borrowed, he would have no means to get it back from the lender.] The case of the Statute of Limitations is merely a suspension of the remedy, which the debtor may remove by again acknowledging the debt. The case of an infant is on account of his want of discretion, and his election to annul or confirm his contract is postponed till a more mature age. The case of *Ellis v. Warnes*¹ was the case of an innocent third person. The ground of the practice in courts of equity is not that they consider the defendant as entitled to the money, but because, unless the complainant waives the penalties of the statute, and among them the forfeiture of the money lent, the defendant could not answer without criminating himself, and subjecting himself to penalties, which a court of equity will not compel him to do. It also is a very different thing whether a court shall aid a plaintiff who has the money of another in his hands to set aside usurious securities, instead of leaving him to his remedy at law, or whether it shall compel a defendant to repay the money borrowed. Here the Court is called on, not to remain neuter, but positively to compel repayment. *Lloyd v. Lee*, 1 Stra. 94. It was held that a married woman who had given a promissory note, and after her husband's death had promised to pay it, was not liable. Yet there was as much consideration in that case as in this. [LAWRENCE, J. The ground of that case, I presume, was that, as the party could not previously be sued on the instrument, there was no forbearance to sue, and therefore no consideration for the promise. And the forbearance being the only consideration alleged in the declaration, though another good consideration might exist, proof of it would not be admissible.] 7 Term Rep. 348, *Mitchinson v. Hewson*: the wife was living; and an express promise of the husband to pay her debt was there averred, and after verdict must be taken as having been proved: that surely was a conscientious consideration; but the court held that the action could not be maintained.

Arguments in reply. Usury is not now held altogether criminal by the law, but only the excess of it; and things not *mala in se* are not to be carried beyond the very letter of prohibitory statutes. In *Lloyd v. Lee* it does not appear that the wife ever received any money on the note for her own benefit, or was at all bound in conscience to pay it; and the case only proves that forbearance is no consideration for a promise made under the influence of terror of an action which would not lie. *Mitchinson v. Hewson* is a decision merely on the form of action, that the husband cannot be sued alone for a debt contracted by the wife before marriage. So in the case of a father promising to pay the debts of his son; in numerous cases it is not consistent either with honor or morality that he should do it. This case is not distinguishable from that of a certificated bankrupt, which rests only on the ground of conscience. Nor is the offence of usury in fact complete till

¹ Cro. Jac. 33, Moor, 752.

usurious interest has been actually paid ; here the payments were made on account generally. It is admitted that where a specific contract on certain terms has been made, an implied contract on other terms cannot be raised ; and it may also be safely admitted that the moral obligation to perform a promise merely because it has been given, is not sufficient to maintain an action ; otherwise every *nudum pactum* would be good. But it does not thence follow that the naked fact of a loan having taken place, one man having received the money of another, is not a sufficient consideration for an express, separate, and independent promise to repay it. Courts of equity could not pursue their present practice, if the repayment of money usuriously borrowed was inconsistent either with law or morality : they could not either directly or collaterally enforce a thing contrary to law : they proceed on the principle that he who comes to them for aid must first do that which is equitable. Supposing that the destruction of the securities had been for the mutual benefit of both parties, still it would be a sufficient consideration for the promise, because it was for the benefit of the defendants. [LAWRENCE, J., observed that there was one other case which had not been mentioned, and which seemed to bear on the subject ; *Fitzroy v. Gwillim*, 1 Term Rep. 153 ; where in trover for goods which had been pledged for money advanced on a usurious contract, Lord Mansfield, C. J., held that it was necessary for the plaintiff to prove a previous tender of the money actually due.] *Cur. adv. vult.*

In the course of the present Term the judges of the court sent to the Lord Chancellor the following certificate of their opinion : —

“This case has been argued before us by counsel, and we are of opinion that under the circumstances the plaintiffs are entitled to recover the above balance of 11,672*l.* 4*s.* 6*d.*”

DAVIS v. DODD.

IN THE COMMON PLEAS, NOVEMBER 9, 1812.

[*Reported in 4 Taunton, 602.*]

THE plaintiff declared upon a bill of exchange for 96*l.* 9*s.* drawn by Allen, to his own order, and accepted by the defendant, and indorsed by Allen to the plaintiff. There were also the usual money counts. Upon the trial at the Maidstone Summer Assizes, 1812, before Lord Ellenborough, C. J., it was proved that the witness had lost the bill out of his pocket ; whereupon, when the bill became due, he applied to the defendant, stating the circumstance and requesting him to pay the bill, which until the time of the action had never been presented for pay-

ment by any other person, and the defendant repeatedly and expressly promised to pay it. Lord Ellenborough was of opinion that, as the plaintiff had not presented the bill for payment to the defendant, and as the bill was not produced at the trial, the plaintiff could not recover in this action, and directed a nonsuit.

Best, Serjt., now moved to set aside the nonsuit, and have a new trial: he contended that the express promise to pay the bill was upheld by the consideration of the moral obligation, to which the defendant was subject, to pay the sum due on his acceptance.

THE COURT denied that there was any moral obligation on the defendant to pay this sum to the plaintiff, who by his negligence had exposed the defendant to the danger of being compelled to pay the bill when produced in the hands of another holder. It was quite clear the plaintiff could not recover in this action. If he could recover at all upon this promise, which they much doubted, it must be in an action upon the special undertaking. The party might have proceeded to enforce the giving of a new bill under the statute, and that seemed to be his only course. The promise contained in the bill is the equivalent given for the consideration paid for the bill. No new consideration had been subsequently paid to sustain this new promise, which was therefore *nudum pactum*, and could not be enforced. *Rule refused.*

LEE v. MUGGERIDGE AND ANOTHER, *Executors of MARY MUGGERIDGE, deceased.*

IN THE COMMON PLEAS, TRINITY TERM, JUNE 29, 1813.

[*Reported in 5 Taunton, 36.*]

THIS was an action of assumpsit, brought under the following circumstances: In 1799, Joseph Hiller, the son of Mrs. Muggeridge, the defendants' testatrix, by a former husband, falling into embarrassed circumstances, she, in order to induce the plaintiff, his father-in-law, to relieve him, proposed by letter to become security to the extent of 2000*l.* by a bond payable at her death. The plaintiff accordingly advanced the money to Joseph Hiller; and Mrs. Muggeridge by her bond, dated the 4th of August, 1799, became bound to the plaintiff in the penal sum of 4000*l.*, with condition that the heirs, executors, or administrators of Mrs. Muggeridge should, within six months after her decease, pay to the plaintiff 1999*l.* 19*s.*, with such part of the interest as Joseph Hiller should omit to pay; it being agreed that he should pay the interest half yearly. Joseph Hiller having neglected to pay the interest, the plaintiff in the year 1804 wrote to Mrs. Muggeridge, requesting payment of the arrears; to which she, after her husband's death, returned an answer by letter, stating "that it was not in her power to pay the

bond off, her time here was but short, and that would be settled by her executors."

It appeared that Mrs. Muggeridge had a considerable separate estate when the bond was given, which she acquired from the father of Joseph Hiller, and the bulk of which she gave by her will to the defendant, Nathaniel Muggeridge. After an ineffectual attempt to establish that the bond constituted an equitable lien or charge upon the separate estate of Mrs. Muggeridge (see 1 V. & B. 118), the plaintiff brought the present action, founded upon the promise contained in the letter above referred to. The declaration stated (*inter alia*) that the testatrix, after the death of her husband, and whilst she was sole, to wit, on the 11th of July, 1804, "in consideration of the premises undertook to the plaintiff that the bond, that is to say, the principal money and interest secured by the bond, should be settled, that is to say, paid, by her executors." The defendants pleaded the general issue; and upon the trial of the cause at the Sittings after Hilary Term, 1813, at Guildhall, before Gibbs, J., the jury found a verdict for the plaintiff.¹

Shepherd, Serjt., in Easter Term last, moved in arrest of judgment, on the ground that no sufficient consideration was shewn for the promise of the deceased. The Court granted a rule *nisi*.

Lens and *Best*, Serjts., in this term shewed cause. They admitted that when the deceased gave the bond, being covert, she had no power thereby to bind herself, but contended that, notwithstanding that, the promise which, after she was liberated from all restriction, she gave in confirmation of the bond, was obligatory on her. The same payment which was recited to be the consideration of the bond is a sufficient consideration for the subsequent promise. This differs nothing from the case of infancy, and the many other cases which subsist in the English law, where, though a party is not compellable to make a promise, yet if he does make it, the promise shall be compulsory on him. In certain cases where the law destroys the remedy, as in the case of the Statute of Limitations, a subsequent promise, operating by the old consideration, will revive the remedy. So, if an estate be devised for payment of debts, the law will not intend that it is exclusively for the payment of such debts as are not barred by the Statute of Limitations, but will intend the devise to be for payment of all debts whatever, unless advantage is taken of the Statute of Limitations by plea. Lord Mansfield, C. J., thought that the rule of *nudum pactum* was much too strict, and that it was competent for parties to make their own agreements on deliberation; and if they did so think fit to make them, that they must be subject to them. It is now fully recognized in the law, that if there be, even in the strictest morality,

¹ In the original report the declaration is set forth with much fulness; but as it is exceedingly prolix, and most of it is wholly irrelevant to the one question argued and decided in the case, it is here omitted, and a statement of the material facts is substituted in its place. Some of the facts stated have been obtained from the report in 1 V. & B. 118. — Ed.

the foundation for a promise, and the promise be accordingly made, it is binding. It is a new *ligamen*, though not a new consideration; for if there were a new consideration, it would be clearly good. Good-right *ex dem.* Carter v. Straphan, Cowp. 201. Lord Mansfield held that an account stated by a widow, allowing interest on a mortgage executed by her during coverture, a direction given by her in writing to her tenant to attorn to the mortgagees, and a paper whereby she purported to surrender the possession, amounted to a delivery by her in her widowhood of the mortgage-deed, holding her previous delivery during coverture to be absolutely void. [MANSFIELD, C. J. That was certainly a very strong case, and I very well remember the surprise I felt at the time when it was decided, because it was making those acts of the widow equivalent to a formal redelivery of the deed; and others were much surprised at it; but it strongly recognizes the principle that a moral obligation is a good consideration. CHAMBERE, J., evinced doubts of this case. GIBBS, J. The position in Perkins, § 154, is not that re-execution, but only redelivery, was requisite; and Lord Mansfield held that her acts were tantamount to a redelivery. He begins by saying: "I thought it cruel to contend for the wife that the mortgage was void," "a security which was entered into for the maintenance of herself and her family," "and after so many solemn acts on her part, it is a proceeding against every principle of natural justice and equity."] The doubt on that case has always been on the form in which Lord Mansfield applies the principle, not on the principle itself; there cannot, however, be a stronger case of moral obligation than the present, for the giving this bond of the deceased was the inducement to the plaintiff to lend the money. Trueman v. Fenton, Cowp. 544. Lord Mansfield and the rest of the Court fully recognize the principle, and found on it their decision, that a bankrupt, promising after he has obtained his certificate to pay a debt thereby barred, is bound by his promise. Barnes v. Hedley, 2 Taunt. 184. A promise to pay the principal money lent on an usurious security, with legal interest, was held valid; and many cases to the like effect are there cited. Although no reasons are assigned for the judgment, it must necessarily have proceeded on the ground that a moral obligation will support a promise to pay.

Shepherd and Vaughan, Serjts., *contra*. The case of Doe v. Straphan is favorable to the defendants. The court were obliged to hold that the deed of a married woman was absolutely void, and by a refinement in law they presumed a redelivery; but no consideration is necessary to give effect to a deed; therefore the case does not decide that an engagement made by the *feme covert*, or money paid for her use, was a good consideration for the subsequent act. It will not be contended that the letter amounts to a redelivery of this bond; if it does, let the plaintiff sue on the bond. [*Lens* disclaimed the redelivery.] Barnes v. Hedley was decided on the ground that the money advanced to the defendant was an old subsisting debt, and

therefore a good consideration for the promise. [HEATH, J. In the case of usury there could be no subsisting debt. GIBBS, J. In this case there was an advance of money.] The *feme covert* never had the money; neither can a *feme covert* by any means create a debt from herself; so that on the declaration the case stands thus, that she, not being indebted, was not liable, and in consideration of her not being liable she undertook to pay. If this money had been advanced, not on her bond, but on her mere promise, a subsequent promise to pay, made when she became discover, would be merely void. A bygone debt from a third person would be no consideration for a promise to pay. There must be an agreement not to sue, or some new consideration moving to the promisor or from the lender. The devise of the property to the executors is no consideration. There is no mutuality or connection between this consideration and this promise, for the whole transaction had an end before the deceased was discover. The law does not recognize the principle to the extent stated, that every moral obligation of any sort or kind whatever would be a good consideration for a promise. There must be a mutuality. This cannot be a stronger case than if the money had been advanced to the *feme covert* herself; yet in *Lloyd v. Lee*, 1 Str. 94, it was held by Pratt, C. J., where a married woman gave a note as a *feme sole*, and after her husband's decease, in consideration of forbearance to sue, promised payment, that the note was not barely voidable, but absolutely void, and that forbearance, where originally there was no cause of action, is no consideration to raise an assumpsit. *Barber v. Fox*, 2 Saund. 134. Assumpsit by the heir to pay the bond of his ancestor, in consideration of forbearance to sue, was held void. [MANSFIELD, C. J. and GIBBS, J. Neither of those cases is applicable, for it did not appear in the last that the ancestor bound his heir in the bond: forbearance to sue is the forbearing of that which he may legally enforce, and as there was before the renewed promise no right of action, so there could be no forbearance. It might, we will suppose, have been the moral duty of the *feme covert* in *Lloyd v. Lee* to pay the note before; but as she was not legally liable without a promise made by her after she was discover, the consideration so averred did not exist, but it does not follow that no other consideration could have been stated that would have supported the promise.] In the cases of bankruptcy, and the Statute of Limitations, the law only suspends the remedy, it does not extinguish the debt; but here no debt ever existed, the acts of a *feme covert* not being voidable like those of an infant, but actually void.

MANSFIELD, C. J. The counsel for the plaintiffs need not trouble themselves to reply to these cases: it has been long established, that where a person is bound morally and conscientiously to pay a debt, though not legally bound, a subsequent promise to pay will give a right of action. The only question therefore is, Whether upon this declaration there appears a good moral obligation! Now I cannot

conceive that there can be a stronger moral obligation than is stated upon this record. Here is this debt of 2,000*l.* created at the desire of the testatrix, lent in fact to her, though paid to Hiller. After her husband's death, she, knowing that this bond had been given, that her son-in-law had received the money, and had not repaid it, knowing all this, she promises that her executors shall pay; if, then, it has been repeatedly decided that a moral consideration is a good consideration for a promise to pay, this declaration is clearly good. This case is not distinguishable in principle from *Barnes v. Hedley*; there, not only the securities were void, but the contract was void; but the money had been lent, and, therefore, when the parties had stripped the transaction of its usury, and reduced the debt to mere principal and interest, the promise made to pay that debt was binding. Lord Mansfield's judgment in the case of *Doe on the demise of Carter v. Straphan* is extremely applicable. Here, in like manner, the wife would have been grossly dishonest, if she had scrupled to give a security for the money advanced at her request. As to the cases cited of *Lloyd v. Lee* and *Barber v. Fox*, there was no forbearance, and those cases proceeded on the ground that no good cause of action was shown on the pleadings.

HEATH, J. I am of the same opinion. Promises without consideration are not enforced, because they are gratuitous, and the law leaves the performance to the liberality of the makers. The notion that a promise may be supported by a moral obligation is not modern; in Charles the Second's time it was said, if there be an iota of equity, it is enough consideration for the promise.

CHAMBRE, J. There cannot be a stronger or clearer case of moral obligation than this. The gentleman has done this lady a great favor, in going to this expense, and accepting an invalid security; and when she could give a better security, it became her duty so to do, and she has done it. In the cases cited it was the plaintiff's fault if, having it in his power to state a good consideration on the record, he neglected so to do.

GIBBS, J. I agree in this case the plaintiff is entitled to recover. It cannot, I think, be disputed now, that wherever there is a moral obligation to pay a debt, or perform a duty, a promise to perform that duty, or pay that debt, will be supported by the previous moral obligation. There cannot be a stronger case than this of moral obligation. The counsel for the defendant did not dare to grapple with this position, but endeavored to show that there was no case in which a subsequent promise had been supported, where there had not been an antecedent legal obligation at some time or other; from whence he wished it to be inferred that, unless there had been the antecedent legal obligation, the mere moral obligation would not be a sufficient consideration to support the promise. But in *Barnes v. Hedley* certainly *Hedley* never was for a moment legally bound to pay a farthing of that money for which he was sued; for it appears to have been advanced upon a previously existing usurious contract; and whatever

was advanced upon such a contract, certainly could not be recovered at any one moment. The borrower, availing himself of the law so far as he honestly might, and no further, reducing it to mere principal and interest, does that which every honest man ought to do in like circumstances, promises to pay it, and that promise was held binding. As to the cases of *Lloyd v. Lee* and *Barber v. Fox*, they have sufficiently been answered by my Lord and my brother Chambre; that if a man will state on his declaration a consideration which is no consideration, and shows no other consideration on his declaration, although another good consideration may exist, when that which he does show fails, he cannot succeed upon the proof of the other which he has not alleged. Now in the first of those cases there was clearly no forbearance, because forbearance must be a deferring to prosecute a legal right; but no legal right to recover previously existed. Whatever other consideration might exist for the promise, it was not stated in the declaration; it is, therefore, clear that this rule must be discharged, upon the ground that wherever there is an antecedent moral obligation, and a subsequent promise given to perform it, it is of sufficient validity for the plaintiff to be able to enforce it.

Rule discharged.

KING v. MILL.

IN THE KING'S BENCH, NOVEMBER 11, 1817.

[*Reported in 1 Barnewall & Alderson, 104.*]

ACTION for work and labor as a surgeon and apothecary. Plea, general issue. At the trial before Holroyd, J., at the last assizes for the county of Leicester, it appeared that the defendant was overseer for the parish of Silk Willoughby, and that this action was brought by the plaintiff to recover the amount charged in his bill for professional attendance on one Richardson, a pauper, who during twelve months illness (induced not by accident, but by gradual decay) received a weekly allowance of four shillings from the parish of Silk Willoughby, which was the place of his settlement; but, during the whole of the plaintiff's attendance on him, he was actually resident in the parish of Easton, where he died. After his death the defendant desired the plaintiff to make out his bill to the overseers of Willoughby parish, and said that he should be paid; and upon these facts a verdict was found for the plaintiff.

Copley, Serjt., now moved for a new trial. There was neither legal liability nor moral obligation to provide for the pauper while resident in Easton, and the subsequent promise was without consideration, and therefore *nudum pactum*. The poor laws are mere arbitrary enactments, and do not carry moral obligations beyond the legal liability,

which in this case attached on the parish which was the residence of the pauper.

LORD ELLENBOROUGH, C. J. In this case both the legal and moral obligation obtain. The parish of Willoughby have by their weekly allowance admitted that they were bound to provide for the pauper; and the defendant, one of the overseers, after the pauper's death, expressly desires the plaintiff to send his bill made out to the overseers, and promises that he shall be paid. The case of *Watson v. Turner* is decisive on the subject, and I have no doubt that the plaintiff is entitled to recover.

BAYLEY, J. I am of the same opinion. If the payment of four shillings per week had not been made by the parish officers of Willoughby, Easton parish would have removed the pauper to the place of his settlement, and in that case the former parish must undoubtedly have provided him medical attendance. The conduct of the defendant as the overseer of Willoughby amounts to an acknowledgment on his part that the plaintiff had attended at the defendant's wish, and upon his responsibility. I therefore think that Willoughby and not Easton was bound to maintain the pauper, and that the promise made after his death is founded on a legal as well as a moral consideration, and therefore affords a good ground of action.

ABBOTT and HOLROYD, JJ., concurred.

*Rule refused.*¹

BINNINGTON v. WALLIS.

IN THE KING'S BENCH, JUNE 29, 1821.

[*Reported in 4 Barnewall & Alderson, 650.*]

DECLARATION stated that, before the making of the promise and undertaking, the plaintiff had cohabited with the defendant as his mistress, and an immoral connection and intercourse had existed between them for a long space of time, to wit, for the space of twelve years; and the plaintiff had thereby been greatly injured in her character and reputation, and deprived of the means of honestly procuring a livelihood; and that, before the time of the making of the promise, to wit, on the 1st of January, 1816, at, &c., the plaintiff wholly ceased to cohabit with the said defendant as his mistress, and to have any immoral intercourse with him; and thereupon it was determined and agreed between them that no immoral intercourse or connection should ever again take place between them; and that the defendant, as a compensation for the injury so sustained by the plaintiff, should pay and allow to the plaintiff the quarterly sum of 10*l.*, while she should be

¹ See *Paynter v. Williams*, 1 Cr. & M. 810. — Ed.

and continue of good and virtuous life, conversation, and demeanor; and thereupon, in consideration of the premises, and that the plaintiff at the request of the defendant would resign and give up the said quarterly sum, he undertook to pay her so much money as the said quarterly sum was reasonably worth, in order to enable her to continue to live in a virtuous and decorous manner. The declaration then averred that the plaintiff did resign and give up the said quarterly sum, and the same from thence wholly ceased and determined; and that she had always, from the time of the cessation of the immoral connection, lived in a virtuous and decorous manner, and been of virtuous life, conversation, and demeanor. It then averred that the quarterly sum was reasonably worth 400*l.*; and then alleged as a breach non-payment by the defendant. The other counts omitted any mention of the quarterly allowance, and in other respects were similar to this. To this declaration there was a general demurrer.

Parke, in support of the demurrer. There is no sufficient consideration to support the promise laid in this declaration. It is not stated that the plaintiff was seduced. There is not even a moral obligation to provide for a woman for past cohabitation. As to the giving up of the annuity, mentioned in one count, that depends upon the same question, for the only consideration for that annuity was the past cohabitation.

Holt, contra. There was a moral consideration for the promise stated in this declaration, for it must be taken (as the contrary does not appear) that the defendant seduced the plaintiff; and if that be so, he was morally bound to make some provision for her. In the *Marchioness of Annandale v. Harris*¹ the Court held a bond given to a seduced woman good; and if it were sufficient to support a bond, it must be equally so to support an express promise. So, also, past cohabitation was deemed sufficient consideration for a bond in the case of *Carew v. Stafford* there cited; and in the case of *Turner v. Vaughan*.² And, secondly, there is a valuable consideration in this case, inasmuch as the plaintiff gave up her annuity.

PER CURIAM. The declaration is insufficient. It is not averred that the defendant was the seducer, and there is no authority to show that past cohabitation alone, or the ceasing to cohabit in future, is a good consideration for a promise of this nature. The cases cited are distinguishable from this, because they are all cases of deeds; and it is a very different question whether a consideration be sufficiently good to sustain a promise, and whether it be so illegal as to make the deed which required no consideration void. There must therefore be judgment for the defendant.

Judgment for defendant.

¹ 2 Peere W. 433.

² 2 Wils. 339.

LITTLEFIELD, *Executrix* of JOHN LITTLEFIELD v.
ELIZABETH SHEE.

IN THE KING'S BENCH, NOVEMBER 4, 1831.

[Reported in 2 Barnewall & Adolphus, 811.]

ASSUMPSIT for goods sold and delivered. The fourth count stated that John Littlefield in his lifetime, at the special instance and request of the defendant, had supplied and delivered to her divers goods and chattels for the sum of 16*l.*; and thereupon, in consideration of the premises, and of the said sum of money being due and unpaid, the defendant, after the death of the said John Littlefield, undertook and promised the plaintiff as executrix of J. L. to pay her the said sum of money as soon as it was in her (the defendant's) power so to do. And although afterwards, to wit, on, &c., at, &c., it was in her power to pay the said sum, yet she did not do so. Plea: the general issue. At the trial before Gaselee, J., at the last Assizes for Sussex, it appeared that the action was brought to recover 15*l.* for butcher's meat supplied by the testator to the defendant, for her own use, between September, 1825, and March, 1826. During that time the defendant was a married woman, but her husband was abroad. After his death she promised to pay the debt when it should be in her power, and her ability to pay was proved at the trial. The learned judge held that, the defendant having been a *feme covert* at the time when the goods were supplied, her husband was originally liable, and consequently there was no consideration for the promise declared upon. The plaintiff was therefore nonsuited. *Hutchinson*, on a former day in this Term, moved to set aside the nonsuit, and to enter a verdict for the plaintiff on the fourth count; on the ground that, the goods having been supplied to the defendant while she was living separate from her husband, she was under a moral obligation to pay for them, and such obligation was a sufficient consideration for a subsequent promise. It was not necessary that there should have been an antecedent legal obligation. *Barnes v. Hedley*, *Lee v. Muggeridge*. *Cur. adv. vult.*

LORD TENTERDEN, C. J., now delivered the judgment of the Court. The fourth count of the declaration states that the testator had at the request of the defendant supplied her with goods, and that in consideration of the premises, and of the price of the goods being due and unpaid, the defendant promised. Now, that is in substance an allegation that those sums were due from her, and the plaintiff failed in proof of that allegation, because it appeared that the goods were supplied to her whilst her husband was living, so that the price constituted a debt due from him. We are therefore of opinion that the declaration was not supported by the proof, and that the nonsuit was right. In *Lee v.*

Muggeridge all the circumstances which showed that the money was in conscience due from the defendant were correctly set forth in the declaration. It there appeared upon the record that the money was lent to her, though paid to her son-in-law, while she was a married woman; and that after her husband's death, she, knowing all the circumstances, promised that her executor should pay the sum due on the bond. I must also observe that the doctrine that a moral obligation is a sufficient consideration for a subsequent promise is one which should be received with some limitation.

Rule refused.

JOHN MEYER v. SARAH HAWORTH.

IN THE QUEEN'S BENCH, JUNE 1, 1838.

[Reported in 8 *Adolphus & Ellis*, 467.]

ASSUMPSIT for goods sold and delivered, goods bargained and sold, and at defendant's request delivered to W. J. R., work and labor, money paid, and interest, and on an account stated.

Plea: coverture at the time of the promise.

Replication: that defendant, at the time when the debts were contracted, was living separate from her husband, and in open adultery with W. J. R.; that the husband was not liable to pay, nor did pay, the debts so contracted by defendant while she was so living separate, &c.; that plaintiff, at the time of the sale and delivery, &c., did not know that defendant was the wife of, &c., nor that she was living in open adultery, &c., and dealt with her as a *feme sole*; and that, after the death of the husband, and before action brought, defendant, in consideration of the premises, promised to pay. Verification.

General demurrer, and joinder.

Streeten, for the defendant. A married woman is not liable for the debts she contracts, though she be living in open adultery, and separate from her husband. [PATTESON, J. I presume the plaintiff does not mean to impugn *Marshall v. Rutton*¹ and other cases to the same effect. The subsequent promise will probably be relied on.] The replication, if it insist on the subsequent promise, is a departure. It admits the promises stated in the declaration to have been made during coverture, and sets up a new promise. The considerations are different: the delivery of the goods, &c., form the consideration in the declaration; the consideration for the promise in the replication is "the premises," which seems to point to a moral consideration. Such a consideration appears not to be sustainable. *Littlefield v. Shee*. *Barden v. De Keverberg*² shows what is necessary to make a *feme covert* liable as a *feme sole*.

¹ 8 T. R. 545.

² 2 Mee. & W. 61.

Humfrey, contra. In *Littlefield v. Shee* the husband was originally liable: here he never was so. *Rex v. Flintan*.¹ *Lee v. Muggeridge* supports the validity of such a moral consideration as this. Then this is not a departure: if it were, every replication to a plea of the Statute of Limitations, setting up an acknowledgment, would be so; for such an acknowledgment is merely evidence of a fresh promise. *Tanner v. Smart*.² [PATTESON, J. That is a promise to pay an existing debt: here there was no debt from the wife.] If there be any state of facts in which the debt would not be absolutely null in the first instance, that distinction would not apply. Now suppose the husband had been transported. [LORD DENMAN, C. J. That should be part of the statement of consideration. PATTESON, J. You are to support your declaration.]

Streeten, in reply. The declaration states the supply of goods at the request of the wife, who could not then contract. The doctrine in *Lee v. Muggeridge* has been qualified by later decisions; and there, too, the special contract was set out in the declaration.

LORD DENMAN, C. J. The record states that goods were supplied to a married woman, who, after her husband's death, promised to pay. That is not sufficient. The debt was never owing from her. If there was a moral obligation, that should have been shown.

LITLEDALE, J. If there was any moral obligation, it should have been stated. The replication does not support the declaration. The promise in the declaration was altogether void. This is not like the case of an infant, whose promise is voidable only.

PATTESON, J. For the reasons given this replication is bad as a departure. The promise originally stated was not merely voidable, like that of an infant. There is another fault in the replication: it does not allege positively the death of the husband.

WILLIAMS, J., concurred.

Judgment for defendant.

EASTWOOD v. KENYON.

IN THE QUEEN'S BENCH, JANUARY 16, 1840.

[Reported in 11 *Adolphus & Ellis*, 438.]

ASSUMPSIT. The declaration stated that one John Sutcliffe made his will, and appointed plaintiff executor thereof, and thereby bequeathed certain property in manner therein mentioned; that he afterwards died without altering his will, leaving one Sarah Sutcliffe, an infant, his daughter and only child, and heiress at law, surviving; that after making the will John Sutcliffe sold the property mentioned therein, and purchased a piece of land upon which he

¹ 1 B. & Ad. 227.

² 6 B. & C. 603.

erected certain cottages, but the same were not completed at the time of his death; which piece of land and cottages were at the time of his death mortgaged by him; that he died intestate in respect of the same, whereupon the equity of redemption descended to the said infant as heiress at law; that after the death of John Sutcliffe, plaintiff duly proved the will and administered to the estate of the deceased; that from and after the death of John Sutcliffe until the said Sarah Sutcliffe came of full age, plaintiff executor as aforesaid "acted as the guardian and agent" of the said infant, and in that capacity expended large sums of money in and about her maintenance and education, and in and about the completion, management, and necessary improvement of the said cottages and premises in which the said Sarah Sutcliffe was so interested, and in paying the interest of the mortgage money chargeable thereon, and otherwise relative thereto, the said expenditure having been made in a prudent and useful manner, and having been beneficial to the interest of the said Sarah Sutcliffe to the full amount thereof; that the estate of John Sutcliffe deceased having been insufficient to allow plaintiff to make the said payments out of it, plaintiff was obliged to advance out of his own moneys, and did advance, a large sum, to wit, 140*l.* for the purpose of the said expenditure; and, in order to reimburse himself, was obliged to borrow, and did borrow, the said sum of one A. Blackburn, and as security made his promissory note for payment thereof to the said A. Blackburn or his order on demand with interest; which sum, so secured by the said promissory note, was at the time of the making thereof and still is wholly due and unpaid to the said A. Blackburn; that the said sum was expended by plaintiff in manner aforesaid for the benefit of the said Sarah Sutcliffe, who received all the benefit and advantage thereof, and such expenditure was useful and beneficial to her to the full amount thereof; that when the said Sarah Sutcliffe came of full age she had notice of the premises, and then assented to the loan so raised by plaintiff, and the security so given by him, and requested plaintiff to give up to one J. Stansfield, as her agent, the control and management of the said property, and then promised the plaintiff to pay and discharge the amount of the said note; and thereupon caused one year's interest upon the said sum of 140*l.* to be paid to A. Blackburn. That thereupon plaintiff agreed to give up, and did then give up, the control and management of the property to the said agent on behalf of the said Sarah Sutcliffe; that all the services of plaintiff were done and given by him for the said Sarah Sutcliffe and for her benefit gratuitously, and without any fee, benefit, or reward whatsoever; and the said services and expenditures were of great benefit to her, and her said property was increased in value by reason thereof to an amount far exceeding the said 140*l.* That afterwards defendant intermarried with the said Sarah Sutcliffe, and had notice of the premises; and the accounts of plaintiff of and concerning the premises were then submitted to defendant, who then examined and assented to the same, and upon such accounting

there was found to be due to plaintiff a large sum of money, to wit, &c., for moneys so expended and borrowed by him as aforesaid; and it also then appeared that plaintiff was indebted to A. Blackburn in the amount of the said note. That defendant, in right of his wife, had and received all the benefit and advantage arising from the said services and expenditure. That thereupon, in consideration of the premises, defendant promised plaintiff that he would pay and discharge the amount of the said promissory note; but that, although a reasonable time for paying and discharging the said note had elapsed, and A. Blackburn, the holder thereof, was willing to accept payment from defendant, and defendant was requested by plaintiff to pay and discharge the amount thereof, defendant did not nor would, then or at any other time, pay or discharge the amount, &c., but wholly refused, &c.

Plea: *non assumpsit*.

On the trial before Patteson, J., at the York Spring Assizes, 1838, it was objected on the part of the defendant that the promise stated in the declaration, and proved, was a promise to pay the debt of another, within the Statute of Frauds, 29 Car. 2, c. 3, s. 4, and ought to have been in writing; on the other hand, it was contended that such defence, if available at all, was not admissible under the plea of *non assumpsit*.¹ The learned judge was of the latter opinion, and the plaintiff had a verdict, subject to a motion to enter a verdict for the defendant.

Cresswell, in the following Term, obtained a rule *nisi* according to the leave reserved, and also for arresting judgment on the ground that the declaration shewed no consideration for the promise alleged. In Trinity Vacation, 1839,

Alexander and *W. H. Watson* shewed cause. . . . It has been distinctly held that a moral obligation will support an express promise. There must be something done by the plaintiff at the defendant's request, or an act done for the defendant's benefit must be ratified by an express promise to pay: in either case an action will lie. [COLERIDGE, J. How are we to know the difference between an express promise and an implied promise on the pleadings?] After verdict an express promise must be presumed. [COLERIDGE, J. The same question may arise on demurrer.] In *Lee v. Muggeridge* executors were held liable on a promise by the testatrix, after the decease of her husband, to pay a bond made by her when under coverture, on the express ground that she was morally bound to pay it. The same doctrine was upheld in *Seago v. Deane*,² *Atkins v. Hill*, and in several other cases cited in the note to *Wennall v. Adney*.³ A stronger case of moral obligation can hardly arise than the present, where the plaintiff is admitted to have been for many years the faithful guardian and manager of the estate of the defendant while she was under age, and

¹ The arguments and decision upon these points are omitted. — Ed.

² 4 Bing. 459.

³ 3 B. & P. 247.

where the defendant and his wife have received great pecuniary benefit from the plaintiff's acts.

Cresswell, contra. . . . What is it that constitutes the moral obligation here? Not the expenditure on the estate, for no duty was cast on the plaintiff to lay out any thing on it, nor had he any right to interfere with the management; and if he had, the defendant had at that time no interest in it at all. If the honesty of the outlay causes the moral obligation, then it is indifferent whether it turned out profitable or not to the defendant or his wife. It would support a promise, though the property had been damaged by it. If the benefit constitutes the consideration, then whenever a party benefits another against his will, a subsequent promise will be a ground of action. If it had appeared that the wife was liable at the time of her marriage, then the consequent liability of the defendant might have supported his promise; but no liability of the wife is stated, nor is it said that she promised in consideration of the premises. As to the agreement of the plaintiff to give up the control and management of the property, he had no right to either, and therefore nothing to give up; and if he had, it is not alleged to have been the consideration of the wife's promise. The doctrine of moral obligation as a ground for a promise must be limited to those cases where the law would have given a clear right of action originally, if some legal impediment had not suspended or precluded the liability of the party. The ordinary instances are infancy, bankruptcy, and the Statute of Limitations; and these were the cases referred to by Lord Mansfield when he laid down the above doctrine. As a general rule, it cannot be supported. *Littlefield v. Shee*. The law is correctly laid down and the cases explained in the note to *Wennall v. Adney*.¹

In this Term (January 16th) the judgment of the Court was delivered by

LORD DENMAN, C. J. . . . The second point arose in arrest of judgment, namely, whether the declaration showed a sufficient consideration for the promise. It stated in effect that the plaintiff was executor under the will of the father of the defendant's wife, who had died intestate as to his real estate, leaving the defendant's wife, an infant, his only child; that the plaintiff had voluntarily expended his money for the improvement of the real estate, while the defendant's wife was sole and a minor; and that, to reimburse himself, he had borrowed money of Blackburn, to whom he had given his promissory note; that the defendant's wife, while sole, had received the benefit, and after she came of age assented and promised to pay the note, and did pay a year's interest; that, after the marriage, the plaintiff's accounts were shown to the defendant, who assented to them, and it appeared that there was due to the plaintiff a sum equal to the amount of the note

¹ 3 B. & P. 247. See also the argument of the Attorney-General in *Haigh v. Brooks*, 10 A. & E. 315, 316.

to Blackburn; that the defendant, in right of his wife, had received all the benefit, and, in consideration of the premises, promised to pay and discharge the amount of the note to Blackburn.

Upon motion in arrest of judgment, this promise must be taken to have been proved, and to have been an express promise, as indeed it must of necessity have been, for no such implied promise in law was ever heard of. It was then argued for the plaintiff that the declaration disclosed a sufficient moral consideration to support the promise.

Most of the older cases on this subject are collected in a learned note to the case of *Wennall v. Adney*,¹ and the conclusion there

¹ 3 B. & P. 249. [The note referred to, which was first published in 1804, is as follows:—

“An idea has prevailed of late years that an express promise, founded simply on an antecedent moral obligation, is sufficient to support an assumpsit. It may be worth consideration, however, whether this proposition be not rather inaccurate, and whether that inaccuracy has not in a great measure arisen from some expressions of Lord Mansfield and Mr. Justice Buller, which, if construed with the qualifications fairly belonging to them, do not warrant the conclusion which appears to have been rather hastily drawn from thence. In *Atkins v. Hill*, Cowp. 288, which was assumpsit against an executor on a promise by him to pay a legacy in consideration of assets, Lord Mansfield said: ‘It is the case of a promise made upon a good and valuable consideration, which in all cases is a sufficient ground to support an action. It is so in cases of obligations which would otherwise only bind a man’s conscience, and which without such promise he could not be compelled to pay.’ And in *Hawkes v. Saunders*, Cowp. 290, which was a similar case with *Atkins v. Hill*, Lord Mansfield said that the rule laid down at the bar ‘that to make a consideration to support an assumpsit there must be either an immediate benefit to the party promising, or a loss to the person to whom the promise was made,’ was too narrow, and observed ‘that a legal or equitable duty is a sufficient consideration for an actual promise; that where a man is under a moral obligation, which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration.’ His Lordship then instanced the several cases of a promise to pay a debt barred by the Statute of Limitations, a promise by a bankrupt after his certificate to pay an antecedent debt, and a promise by a person of full age to pay a debt contracted during his infancy. The opinion of Mr. Justice Buller in the last case was to the same effect, and the same law was again laid down by Lord Mansfield in *Trueman v. Fenton*, Cowp. 544. Of the two former cases it may be observed that the particular point decided in them has been overruled by the subsequent case of *Deeks v. Strutt*, 5 T. R. 690. And it may further be observed, that however general the expressions used by Lord Mansfield may at first sight appear, yet the instances adduced by him as illustrative of the rule of law do not carry that rule beyond what the older authorities seem to recognize as its proper limits; for in each instance the party bound by the promise had received a benefit previous to the promise. Indeed it seems that in such instances alone as those selected by Lord Mansfield will an express promise have any operation, and there it only becomes necessary because, though the consideration was originally beneficial to the party promising, yet, inasmuch as he was not of a capacity to bind himself when he received the benefit, or is protected from liability by some statute provision, or some stubborn rule of law, the law will not, as in ordinary cases, imply an assumpsit against him. The same observation is applicable to *Trueman v. Fenton*, that being an action against a bankrupt on a promise made by him subsequent to his certificate respecting a debt due before the certificate. There is, however, rather a loose note of a case of *Scott v. Nelson*, Westminster Sittings, 4 Geo. 3, cor. Ld. Mansfield (see Esp. N. P. 945), in which his Lordship is said to have held a father bound by his promise to pay for the previous maintenance of

arrived at seems to be correct in general, "that an express promise can only revive a precedent good consideration, which might have been

a bastard child. And there is also an anonymous case, 2 Show. 184, where Lord C. J. Pemberton ruled that 'for meat and drink for a bastard child an *indebitatus assumpsit* will lie.' Although the latter case does not expressly say that there was a previous request by the defendant, yet that seems to have been the fact, for Lord Hale's opinion is cited to show 'that where there is common charity and a charge, the action will lie; which seems to imply that if a charge be imposed upon one person by the charitable conduct of another, the latter shall pay; and though he adds, 'and undoubtedly a special promise would reach it,' that expression does not necessarily import a promise subsequent to the charge being sustained, but may be supposed to mean that, where a party is induced to undertake a charge by the engagement of another to pay, the latter will certainly be liable, even though he should not be so where the charge was only induced by his conduct without such engagement. The case of *Watson v. Turner*, Bull. N. P. 147, has sometimes been cited in support of what has been supposed to be the general principle laid down by Lord Mansfield, because in that case overseers were held bound by a mere subsequent promise to pay an apothecary's bill for care taken of a pauper; but it may be observed that 'this was adjudged not to be *nudum pactum*, for the overseers are bound to provide for the poor;' which obligation, being a legal obligation, distinguishes the case. Indeed, in a late case of *Atkins v. Banwell*, 2 East, 505, that distinction does not seem to have been sufficiently adverted to; for *Watson v. Turner* was cited to show that a mere moral obligation is sufficient to raise an implied *assumpsit*, and though the Court denied that proposition, yet Lord Ellenborough observed that the promise given in the case of *Watson v. Turner* made all the difference between the two cases, without alluding to another distinction which might have been taken; viz., that though the parish officers were bound by law in *Watson v. Turner*, the defendants in the principal case were not so bound, because the pauper had been relieved by the plaintiffs as overseers of another parish, though belonging to the parish of which the defendants were overseers. In the older cases no mention is made of moral obligation; but it seems to have been much doubted whether mere natural affection was a sufficient consideration to support an *assumpsit*, though coupled with a subsequent express promise. Indeed Lord Mansfield appears to have used the term 'moral obligation,' not as expressive of any vague and undefined claim arising from nearness of relationship, but of those imperative duties which would be enforceable by law, were it not for some positive rule, which, with a view to general benefit, exempts the party in that particular instance from legal liability. On such duties, so exempted, an express promise operates to revive the liability and take away the exemption, because, if it were not for the exemption, they would be enforced at law through the medium of an implied promise. In several of the cases it is laid down, that to support an *assumpsit* the party promising must derive a benefit, or the party performing sustain an inconvenience occasioned by the defendant. *Per Coke* and all the Justices, *Hatch and Capel's Case*, Godb. 202; *per Reeve, J.*, Mar. 203; *per Coke, C. J.*, and *Dodderidge, J.*, 3 Bulst. 162; and *per Coke, C. J.*, 1 Roll. Rep. 61, pl. 4. And in *Lamplough v. Brathwait*, Hob. 105, it was resolved 'that a mere voluntary courtesy will not have a consideration to uphold an *assumpsit*. But if that courtesy were moved by a suit or request of the party that gives the *assumpsit*, it will bind; for the promise, though it follows, is not naked, and couples itself with the suit before, and the merits of the party procured by that suit.' And in *Bret v. J. S. and his Wife*, Cro. Eliz. 756, where the first husband of the wife sent his son to table with the plaintiff for three years at 8*l.* per annum, and died within the year, and the wife during her widowhood, in consideration that the son should continue the residue of the time, promised to pay the plaintiff 6*l.* 13*s.* 4*d.* for the time past, and 8*l.* for every year after, and upon which promise the plaintiff brought his action; the court held that natural affection was not of itself a sufficient ground for an *assumpsit*; for although it was sufficient to raise an use, yet it was not sufficient to

enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law; but can give no original

ground an action without an express *quid pro quo*; but that as the promise was not only in consideration of affection, but that the son should afterwards continue at the plaintiff's table, it was sufficient to support a promise. In *Harford v. Gardiner*, 2 Leo. 30, it was said by the Court, that love and friendship are not considerations to found actions upon; and in *Best v. Jolly*, 1 Sid. 38, where a father was held liable for his own and his son's debt, because he had promised to pay them if the plaintiff would forbear to sue for them, yet the Court said 'he was not liable for his son's debt,' but having induced forbearance, which is a damage to the plaintiff, he was held liable, 'though as to the son's debt it was no benefit to the defendant.' So in *Besfich v. Coggil*, Palm. 559, it was debated whether the defendant was liable upon an express promise to repay the plaintiff money laid out by him in Spain for the defendant's son, and the charges of his funeral; Hyde, C. J., and Whitelocke being of opinion that the action could not be maintained; Jones and Dodderidge *e contra* that it could. The former of which, it should seem, was the better opinion; for in *Butcher v. Andrews*, Carth. 446, on assumpsit for money lent by the plaintiff to the defendant's son at his instance and request, and verdict for the plaintiff, the judgment was arrested, Holt, C. J., saying, 'If it had been an *indebitatus* for so much money paid by the plaintiff at the request of the defendant unto his son, it might have been good, for then it would be the father's debt and not the son's; but when the money is lent to the son, it is his proper debt, and not the father's.' But in *Church v. Church*, B. R. 1656, cit. Sir T. Ray. 260, where defendant promised to repay the plaintiff the charges of his son's funeral, the latter was held entitled to recover, though no request was laid in the declaration. Of which case it may be observed, that possibly after verdict the Court presumed a request proved; for in *Hayes v. Warren*, 2 Str. 933, though the Court would not presume a request after judgment by default, yet they said they would have presumed it after verdict. However, in *Style v. Smith*, cited by Popham, J., 2 Leon. 111, it was determined that if a physician in the absence of a father give his son medicine, and the father in consideration promise to pay him, an action will lie for the money. But the case of *Style v. Smith*, if closely examined, will not perhaps be found so discordant with the principle laid down in *Bret v. J. S. and his Wife*, as may be supposed. From the expression 'in the absence of a father,' used in that case, it may be inferred that the son lived with the father, and that the medicine was administered to the son in the house of the father while the latter was absent, from whence it results that the physician's debt, though not founded on any immediate benefit to the father, or on his request, was most probably founded on his credit; which credit, if fairly inferred from circumstances by the physician, might operate to charge the father in the same way as his request would operate, the physician having sustained a loss in consequence of that credit. Indeed, if any of the cases could be sustained on the principle that a father is, by the mere force of moral obligation, bound to pay what has been advanced for his son, because he has subsequently promised to pay it, by the same rule the son should be liable for the debt of the father upon a similar promise; for the same moral obligation exists in both cases. Yet in *Barber v. Fox*, 2 Saund. 136, the Court arrested the judgment in an action of assumpsit on a promise made by the defendant to avoid being sued on a bond of his father, it not being alleged that the defendant's father had bound himself and his heirs; for they refused to intend even after verdict that the bond was in the usual form, and consequently held the promise of the defendant *nudum pactum*, he not appearing to have been liable to be sued upon the bond. And this last case was confirmed in *Hunt v. Swain*, 1 Lev. 165, Sir T. Ray. 127, 1 Sid. 248. See note 2 to *Barber v. Fox*, by Mr. Serjt. Williams. Indeed it is clear from *Lloyd v. Lee*, 1 Str. 94, and *Cockshott v. Bennett*, 2 T. R. 763, that if a contract between two persons be void, and not merely voidable, no subsequent express promise will operate to charge the party promising, even though he has derived a benefit from the contract. Yet according to the commonly received notion respecting moral obli-

right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision." Instances are given of voidable contracts, as those of infants ratified by an express promise after age, and distinguished from void contracts, as of married women, not capable of ratification by them when widows: *Lloyd v. Lee*; debts of bankrupts revived by subsequent promise after certificate; and similar cases. Since that time some cases have occurred upon this subject, which require to be more particularly examined. *Barnes v. Hedley* decided that a promise to repay a sum of money with legal interest, which sum had originally been lent on usurious terms, but, in taking the account of which, all usurious items had been by agreement struck out, was binding. *Lee v. Muggerridge* upheld an assumpsit by a widow that her executors should pay a bond given by her while a *feme covert* to secure money then advanced to a third person at her request. On the latter occasion the language of Mansfield, C. J., and of the whole Court of Common Pleas, is very large, and hardly susceptible of any limitation. It is conformable to the expressions used by the judges of this court in *Cooper v. Martin*,¹ where a stepfather was permitted to recover from the son of his wife, after he had attained his full age, upon a declaration for necessities furnished to him while an infant, for which, after his full age, he promised to pay. It is remarkable that in none of these was there any allusion made to the learned note in 3 Bosanquet and Puller, above referred to, and which has been very generally thought to contain a correct statement of the law. The case of *Barnes v. Hedley* is fully consistent with the doctrine in that note laid down. *Cooper v. Martin*, also, when fully examined, will be found not to be inconsistent with it. This last case appears to have occupied the attention of the Court much more in respect of the supposed statutable liability of a stepfather, which was denied by the Court, and in respect of what a court of equity would hold as to a stepfather's liability, and rather to have assumed the point before us. It should, however, be observed that Lord Ellenborough, in giving his judgment, says: "The

gations and the force attributed to a subsequent express promise, such a person ought to pay. An express promise, therefore, as it should seem, can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision. In addition to the cases already collected upon this subject, it may be observed that in *Mitchinson v. Hewson*, 7 T. R. 348, the Court of King's Bench, upon the authority of *Drue v. Thorne*, All. 72, held a husband not liable to be sued alone for the debt of his wife contracted before marriage, though the objection was only taken in arrest of judgment, and consequently a promise by him to pay the debt appeared upon the record. From whence this principle may be extracted: that an obligation to pay in one right, even though it be a legal obligation, and coupled with an express promise, will not support an assumpsit to pay in another right." — Ed.]

¹ 4 East, 76.

plaintiff having done an act beneficial for the defendant in his infancy, it is a good consideration for the defendant's promise after he came of age. In such a case the law will imply a request, and the fact of the promise has been found by the jury." And undoubtedly the action would have lain against the defendant whilst an infant, inasmuch as it was for necessities furnished at his request, in regard to which the law raises an implied promise. The case of *Lee v. Muggeridge* must, however, be allowed to be decidedly at variance with the doctrine in the note alluded to, and is a decision of great authority. It should, however, be observed that in that case there was an actual request of the defendant during coverture, though not one binding in law; but the ground of decision there taken was also equally applicable to *Littlefield v. Shee*, tried by Gaselee, J., at N. P., when that learned judge held, notwithstanding, that "the defendant having been a married woman when the goods were supplied, her husband was originally liable, and there was no consideration for the promise declared upon." After time taken for deliberation, this Court refused even a rule to show cause why the nonsuit should not be set aside. *Lee v. Muggeridge* was cited on the motion, and was sought to be distinguished by Lord Tenterden, because there the circumstances raising the consideration were set out truly upon the record; but in *Littlefield v. Shee* the declaration stated the consideration to be that the plaintiff had supplied the defendant with goods at her request, which the plaintiff failed in proving, inasmuch as it appeared that the goods were in point of law supplied to the defendant's husband, and not to her. But Lord Tenterden added that the doctrine that a moral obligation is a sufficient consideration for a subsequent promise is one which should be received with some limitation. This sentence, in truth, amounts to a dissent from the authority of *Lee v. Muggeridge*, where the doctrine is wholly unqualified.

The eminent counsel who argued for the plaintiff in *Lee v. Muggeridge* spoke of Lord Mansfield as having considered the rule of *nudum pactum* as too narrow, and maintained that all promises deliberately made ought to be held binding. I do not find this language ascribed to him by any reporter, and do not know whether we are to receive it as a traditional report, or as a deduction from what he does appear to have laid down. If the latter, the note to *Wennall v. Adney* shows the deduction to be erroneous. If the former, Lord Tenterden and this Court declared that they could not adopt it in *Littlefield v. Shee*. Indeed the doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it.

The enforcement of such promises by law, however plausibly reconciled by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society, one of which would be the frequent preference of voluntary undertakings to claims for just debts. Suits would thereby be multiplied, and voluntary undertakings

would also be multiplied, to the prejudice of real creditors. The temptations of executors would be much increased by the prevalence of such a doctrine, and the faithful discharge of their duty be rendered more difficult.

Taking, then, the promise of the defendant, as stated on this record, to have been an express promise, we find that the consideration for it was past and executed long before; and yet it is not laid to have been at the request of the defendant, nor even of his wife while sole (though if it had, the case of *Mitchinson v. Hewson*¹ shows that it would not have been sufficient), and the declaration really discloses nothing but a benefit voluntarily conferred by the plaintiff and received by the defendant, with an express promise by the defendant to pay money.

If the subsequent assent of the defendant could have amounted to a *ratihabitio*, the declaration should have stated the money to have been expended at his request, and the ratification should have been relied on as matter of evidence; but this was obviously impossible, because the defendant was in no way connected with the property or with the plaintiff, when the money was expended. If the ratification of the wife while sole were relied on, then a debt from her would have been shown, and the defendant could not have been charged in his own right without some further consideration, as of forbearance after marriage, or something of that sort; and then another point would have arisen upon the Statute of Frauds which did not arise as it was, but which might in that case have been available under the plea of *non assumpsit*.

In holding this declaration bad, because it states no consideration but a past benefit not conferred at the request of the defendant, we conceive that we are justified by the old common law of England.

Lampleigh v. Brathwait is selected by Mr. Smith² as the leading case on this subject, which was there fully discussed, though not necessary to the decision. Hobart, C. J., lays it down that a "mere voluntary courtesy will not have a consideration to uphold an *assumpsit*. But if that courtesy were moved by a suit or request of the party that gives the *assumpsit*, it will bind; for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit; which is the difference;" a difference brought fully out by *Hunt v. Bate*, there cited from *Dyer*, where a promise to indemnify the plaintiff against the consequences of having bailed the defendant's servant, which the plaintiff had done without request of the defendant, was held to be made without consideration; but a promise to pay 20*l.* to plaintiff, who had married defendant's cousin, but at defendant's special instance, was held binding.

The distinction is noted, and was acted upon, in *Townsend v. Hunt*, and indeed in numerous old books; while the principle of moral obligation does not make its appearance till the days of Lord Mansfield, and

¹ 7 T. R. 348.

² 1 Smith's Leading Cases, 67.

then under circumstances not inconsistent with this ancient doctrine when properly explained.

Upon the whole, we are of opinion that the rule must be made absolute to arrest the judgment.

*Rule to arrest judgment, absolute.*¹

JENNINGS AND WIFE v. BROWN AND OTHERS, *Executors*.

IN THE EXCHEQUER, HILARY TERM (JANUARY 31), 1842.

[Reported in 9 Meeson & Welsby, 496.]

ASSUMPSIT. The declaration stated that, before the making of the promise of the said A. B. B. (the defendants' testator), to wit, on the 1st January, 1833, the plaintiff Mary, being then sole and unmarried, and having theretofore always conducted herself with chastity and decorum, was seduced by the said A. B. B., who then debauched and carnally knew the said plaintiff Mary, so being sole and unmarried as aforesaid, and by means of which said seduction and carnal knowledge the said plaintiff Mary then became pregnant, and afterwards and in the lifetime of the said A. B. B., and before the making of the said promise, to wit, on the 3d November, 1833, was delivered of a bastard child, to wit, a daughter, which said child had been and was begotten by the said A. B. B., and is still living; and whereas also afterwards, and in the lifetime of the said A. B. B., and before the making of the said promise as aforesaid, the said plaintiff Mary, so being then sole and unmarried as aforesaid, and having wholly relinquished and given up all cohabitation and immoral intercourse with the said A. B. B., had at his request undertaken, and then had the care and nurture of the said child; and thereupon afterwards, and in the lifetime of the said A. B. B., to wit, on the day and year last aforesaid, in consideration of the premises, and that the said plaintiff Mary would continue to take charge of the said child, and would thenceforth conduct herself correctly and virtuously, and would also keep secret the said fact that the said A. B. B. had so seduced and debauched the said plaintiff Mary, and was the father of the said bastard child, he the said A. B. B. then promised the said plaintiff Mary, then being sole and unmarried as aforesaid, that he the said A. B. B., his executors or administrators, should or would punctually pay

¹ The opinion ascribed to Lord Mansfield respecting the rule of *nudum pactum* appears to be not an unreasonable deduction from the cases of *Pillans v. Mierop*, 3 Burr. 1663; and *Williamson v. Losh*, reported from the paper books of Ashurst, J., in *Chitty on Bills*, 75, note (x), 9th ed. Both are commented on by the Lord C. B. Skynner, in *Rann v. Hughes*, 7 T. R. 350, note (a). See also Evans's *General View of the Decisions of Lord Mansfield*, vol. i. p. 422.

or cause to be paid to the said plaintiff Mary an allowance of 60*l.* a year during her natural life, by four quarterly payments in every year, to wit, on, &c., in each year; and the said plaintiffs aver that the said plaintiff Mary hath always, from the time of the making of the said promise of the said A. B. B. as aforesaid, continued to take charge of the said bastard child, and that the said plaintiff Mary hath also, from the time of the making of the said promise hitherto, conducted herself correctly and virtuously, and did not at any time after the making of the said promise, and during the lifetime of the said A. B. B., cohabit or have any immoral intercourse with the said A. B. B., and hath also always hitherto kept secret the said fact that the said A. B. B. did so seduce and debauch the said plaintiff Mary, and was the father of the said bastard child as aforesaid; of all which several premises respectively the said defendants, executors as aforesaid, have continually had notice; and the plaintiffs in fact say that afterwards, and after the death of the said A. B. B., and after the said intermarriage of the plaintiffs, and before the commencement of this suit, to wit, on the 12th November, 1841, a large sum of money, to wit, the sum of 180*l.* of the said yearly allowance of 60*l.*, for twelve quarters of a year, which then, and as well after the said death of the said A. B. B. as after the said intermarriage of the plaintiffs had elapsed, became due and payable to the plaintiffs under and by virtue of the said promise of the said A. B. B. in that behalf; nevertheless the defendants, executors as aforesaid, not regarding the said promise of the said A. B. B., have not at any time paid to the plaintiffs the said sum of 180*l.* or any part thereof (although often requested so to do), but have hitherto wholly neglected and refused so to do, and the same is still wholly due and unpaid, contrary to the said promise of the said A. B. B. in that behalf made as aforesaid.

The defendants pleaded *non assumpservunt*, and other pleas; traversing the seduction; that the child was begotten by the testator; alleging that the plaintiff Mary had not, at the time of making the promise, relinquished cohabitation with the testator; nor had she undertaken nor had the care or nurture of the child; nor had she continued to take charge of the child, nor kept secret the fact that the testator did seduce the plaintiff Mary, and was the father of the child. But all these pleas, on which issues were taken, were negatived by the finding of the jury.

The cause was tried before Rolfe, B., at the London Sittings in this Term. It appeared that the action was brought to recover twelve quarterly payments of an annuity of 60*l.* a year, under the following circumstances: the testator, in the year 1833, became acquainted with the plaintiff Mary, a servant in his establishment; and the result was the birth of a child in the month of November in that year, which by a letter to her father he acknowledged himself to be the father of, and said that she and her child were amply provided for. It appeared that he paid her an annuity of 60*l.* a year, and refrained

from further criminal intercourse with her. Shortly after, the plaintiff Mary entertained intentions of getting married, and applied to the testator for the purpose of getting the annuity previously settled upon her. In reply to which the testator wrote her the following letter:—

DEC. 31st, 1834.

MARY, — I received your letter of yesterday, and feel a little annoyed at the distrust you entertain for my not providing for your child while I live, and after my decease. You seem to have got some would-be cunning adviser, which, if you do not mind, will cause you to lose a friend, instead of making one. Your father, by writing an imprudent letter, was very near doing you harm. When I spoke of an annuity, I did not consider that, from your youth and good health, the office would require (to allow the sum of 60*l.* a year) a large deposit of some thousands, and which, were you to die the day after, would be entirely thrown away, besides its being a sum I am neither willing nor able to lay down.

And after stating other matters, and that her marrying would not alter his intentions, he adds:—

Thus, then, as long as your future conduct is correct, and the situation you have been placed in remains a secret, my allowance to you of 60*l.* a year will be paid with punctuality; but I must remind you, were it to become known, the allowance of a magistrate would be 4*s.* 6*d.* or 5*s.* per week, which is 13*l.* per annum. Under these circumstances, I should recommend you to consider me your friend, and place that confidence in me which you never had reason to doubt. Should you marry, for your mutual happiness, I would never see you but in the presence of your husband.

Shortly after this the plaintiffs were married, and a letter of congratulation, dated January 31, 1835, was written to her by the testator, which contained, amongst others, the following passage: “The allowance I told you I would make for the maintenance of Emma shall always be punctually paid quarterly.”

The annuity was accordingly paid up to the testator's death, in March, 1839; but his executors, not feeling themselves justified in paying the annuity without the sanction of a court of law, refused to pay it, and the present action was brought. It was proved that the child was now living with the plaintiffs. The above facts having been proved, and the letters read in evidence, the counsel for the defendants objected that there was nothing in the correspondence which made out the consideration as expressed in the declaration. The learned judge, however, overruled the objection; and the jury found a verdict for the plaintiffs, with 180*l.* damages, leave being reserved to the defendants to move to enter a nonsuit.

Humfrey now moved to enter a nonsuit accordingly. The letters written by the testator, and produced in evidence, do not shew a sufficient consideration to support the action. This is not the case of an instrument under seal, but a mere *assumpsit*, which is invalid for want

of a consideration, and cannot be enforced either at law or in equity. *Binnington v. Wallis* is in point. There the declaration stated that the plaintiff had cohabited with the defendant as his mistress; that it was agreed that no further immoral connection should take place between them, and that the defendant should allow her an annuity so long as she should continue of good and virtuous life and demeanor; that afterwards, in consideration of the premises, and that the plaintiff would give up the annuity, the defendant promised to pay as much as the annuity was reasonably worth. The court, on general demurrer, held the declaration bad. The only difference between that case and this is, that here it is stated that the testator seduced her; but that makes no difference. [PARKE, B. No, that makes no difference; but here the woman has supported the child, and that is a good consideration. It is a matter of bargain that she is to take care of the child, and to exonerate the father.] In *Binnington v. Wallis* there was abundant proof of consideration, for the plaintiff had given up the annuity. [PARKE, B. No, that was not part of the consideration; it was a mere moral consideration, which is nothing.] The courts have never yet gone to the extent of holding such an agreement valid.

PER CURIAM. The father might have had the child affiliated on him, and the consideration must be understood to be for ordinary provision. We think that a sufficient consideration. *Rule refused.*

CAROLINE BEAUMONT v. HENRY REEVE.

IN THE QUEEN'S BENCH, JANUARY 27, 1846.

[*Reported in 8 Queen's Bench Reports, 483.*]

ASSUMPSIT. The first count of the declaration alleged that whereas, before the making of the promise of defendant after mentioned, defendant had seduced and debauched plaintiff, and had induced and procured her to cohabit with him as his mistress for a long term, to wit, five years, and plaintiff by reason of the premises had been and was greatly injured in her character and reputation, and prejudiced in and deprived of the means of procuring an honest livelihood, and otherwise damaged; and whereas, before and at the time of making the promise, &c., plaintiff had ceased to cohabit with and then lived apart and separate from defendant; and thereupon heretofore, to wit, on, &c., it was agreed between plaintiff and defendant that they should continue to live apart from each other, and that no immoral intercourse or connection should ever again take place between them; and defendant, as a compensation for the injury so sustained by plaintiff, and in consideration of the premises, then undertook and promised plaintiff to allow and

pay her yearly, from the said day, &c., during her life, towards and for her support and maintenance an annuity of 60*l.*; that, although plaintiff and defendant did not, at any time after the making of the promise of defendant, reside or cohabit together, yet defendant, disregarding, &c., hath not allowed or paid the annuity, &c., although often requested; and a large, &c., to wit, 60*l.* of the annuity, for one year, ending upon, &c., now is due, &c. Special demurrer, assigning for cause the grounds insisted on in the argument. Joinder.

Crompton, for the defendant. The declaration is bad in substance, as disclosing no legal consideration for the promise. In *Binnington v. Wallis* the declaration recited that the plaintiff had cohabited with the defendant as his mistress, whereby she had been injured in her reputation; that they had ceased to cohabit; that the two had agreed that no immoral intercourse should again take place between them, and defendant, as a compensation for the injury sustained by plaintiff, should pay her an annuity while she continued of good and virtuous life; and thereupon, in consideration of the premises, and that plaintiff would give up the annuity, defendant undertook to pay her its worth: and it was held that no consideration was disclosed, the plaintiff giving up only that which was of no value, inasmuch as she could not have enforced the original agreement for want of consideration. [PATTESON, J. The defendant's counsel there pointed out that the declaration did not aver that the plaintiff had been seduced; and the Court seemed to think that an averment of seduction by the defendant would have supplied the defect: here that appears.] That makes no difference. A promise to induce cohabitation would clearly be illegal: here the consideration is only void. Where a part of a consideration is illegal, it vitiates the whole; where it is simply void, the remainder of the consideration, if good, will support an *assumpsit*.¹ In *Jennings v. Brown*, where a consideration appeared similar to that in the present action, the action was supported on the ground that there was also a good consideration, namely, that the plaintiff would support a child which was the fruit of the intercourse; and Parke, B., said that it made no difference as to the invalidity of the former consideration, that the defendant had seduced the plaintiff. [PATTESON, J., mentioned *Gibson v. Dickie*.²] There the consideration was future, that the plaintiff should not cohabit with a third party or any one else; and the court held that this was a valid consideration and would support the action, nothing illegal appearing: the case was compared to that of an annuity to a widow *dum caste vixerit*. The decisions on bonds are inapplicable: a bond needs no consideration: it is sufficient that there is not an illegal one. This explains *Marchioness of Annandale v. Harris*³ and *Turner v. Vaughan*.⁴ [PATTESON, J., referred to *Walker v. Perkins*.⁵] That was the case of a bond upon consideration posi-

¹ See note (e) to *Barber v. Fox*, 2 Wms. Saund. 137 *h*.

² 3 M. & S. 463.

³ 2 P. Wms. 432.

⁴ 2 Wils. 339.

⁵ 1 W. Bl. 517.

tively illegal. [WIGHTMAN, J. The declaration here alleges that the plaintiff was injured in her character, and deprived of the means of procuring an honest livelihood.] That is a mere aggravation of the seduction; but the seduction raises no consideration. The word has no legal meaning. [WIGHTMAN, J. There is the word "debauched."] That does not necessarily mean that the plaintiff was chaste before her connection with the defendant. At the utmost, there is no more than what has been called a moral consideration, which it is now settled will not support an assumpsit even with an express promise. *Eastwood v. Kenyon*, and other cases cited in note (e) to *Barber v. Fox*,¹ which support the doctrine in note (a) to *Wennall v. Adney*,² that even an express promise upon a mere moral consideration does not support an assumpsit, but "can only revive a preceding good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision." *Lee v. Muggeridge* must now be considered as overruled by *Littlefield v. Shee* and other authorities already referred to. (He was then stopped by the Court.)

Banks, contra. It must be conceded that a promise to pay money in consideration of future cohabitation would be illegal; but it is otherwise when the consideration is past cohabitation. There, although the promises will be void if it does not appear that the defendant seduced the plaintiff, *Binnington v. Wallis*, yet, as there pointed out, the invalidity results from the absence of such an allegation. Here the allegation is expressly made; and therefore the case falls within the authority of *Marchioness of Annandale v. Harris*.

LORD DENMAN, C. J. I think *Binnington v. Wallis*, connecting it with the *dictum* of Parke, B., in *Jennings v. Brown*, directly in point. The moral consideration which alone appears here cannot support an assumpsit. That principle has been lately acted upon by this Court in *Eastwood v. Kenyon*, where we adopted the doctrine laid down in the note to *Wennall v. Adney*. The result is, that an express promise cannot be supported by a consideration from which the law could not imply a promise, except where the express promise does away with a legal suspension or bar of a right of action which, but for such suspension or bar, would be valid. This result we arrived at after much deliberation; and we now adhere to it.

PATTESON, J. This declaration appears to be framed on a view suggested by some expressions in *Binnington v. Wallis* which point to a distinction between that case and cases where the defendant is the seducer of the plaintiff. But, looking at *Eastwood v. Kenyon* and *Jennings v. Brown*, it is clear that circumstance is of no consequence

¹ 2 Wms. Saund. 137 e. See note (a) to *Osborne v. Rogers*, 1 Wms. Saund. 264 a, and *Kaye v. Dutton* (there referred to), 7 M. & G. 807.

² 3 B. & P. 247, 252.

as to the legal right. The seduction could give the plaintiff no direct right of action, and can therefore create no liability of any kind from which a consideration can arise.

COLERIDGE, J. *Eastwood v. Kenyon*, which affirmed the doctrine in the note to *Wennall v. Adney*, has established the principle that a moral consideration will not support an assumpsit: there are certainly some apparent exceptions; but here we have only to act upon the general rule. In *Binnington v. Wallis* the Court did indeed suggest that the previous fact of the seduction might make a distinction; but that clearly is not so. The circumstance of previous seduction adds nothing but an executed consideration resting on moral grounds only.

WIGHTMAN, J. I felt some doubt in this case; but, on considering the point, I agree that a precedent moral obligation, not capable of creating an original cause of action, will not support an express promise. And clearly, on the authorities, there is nothing here to raise any obligation beyond that. We therefore must act on the doctrine laid down in the note to *Wennall v. Adney*.

Judgment for defendant.

FLIGHT v. REED.

IN THE EXCHEQUER, JANUARY 21, 1863.

[*Reported in 1 Hurlstone & Coltman, 703.*]

DECLARATION on six bills of exchange, drawn in the years 1855 and 1856 by the plaintiff upon and accepted by the defendant.

Plea: That before the making of the said bills of exchange in the declaration mentioned, or any or either of them, to wit, on the thirty-first day of October, A.D. 1845, it was corruptly, and against the form of the statute in that behalf made and provided, agreed between the plaintiff and defendant, and one — Robinson, that the plaintiff should lend and advance to the defendant and the said — Robinson a certain sum of money, to wit, 1,500*l.*, and that the plaintiff should forbear and give day of payment to the defendant and the said — Robinson until a day then to come, to wit, until the bills of exchange next hereinafter mentioned should become due and payable, and that for such forbearance the defendant and the said — Robinson should pay to the plaintiff more than lawful interest at the rate of 5*l.* per centum per annum upon the said sums of money so lent and forborne by the plaintiff to the defendant, that is to say 100*l.* And that for securing the repayment of the said sum of 1,500*l.* and interest, the defendant and the said — Robinson should accept and deliver to the plaintiff certain bills of exchange drawn by the plaintiff upon them, whereby they should engage to pay to the

plaintiff or his order 1,600*l.* ten weeks after the date thereof and of the said loan. And the defendant further says that, in pursuance of the said unlawful agreement, the plaintiff accordingly, to wit, on the day and year aforesaid, made the said loan and advance to the defendant and the said — Robinson, and they then accordingly accepted bills of exchange drawn by plaintiff on them for the sum of 1,600*l.* payable as aforesaid. And that save as aforesaid there never was any consideration for the acceptance by the defendant of the said last-mentioned bills of exchange, or any or either of them. And the defendant further says that the said bills were dishonored at maturity, and that the bills of exchange in the declaration mentioned were accepted and given, after the passing of the statute 17 & 18 Vict. c. 90, by way of renewal of the said other bills of exchange, to secure the payment to the plaintiff of the money secured by the said other bills of exchange so given to the plaintiff as aforesaid, including the said sum of 100*l.* heretofore mentioned, and in the said other bills included as interest as aforesaid; and that save as aforesaid there never was any value or consideration for the acceptance by the defendant of the bills of exchange in the declaration mentioned, or any or either of them.

Demurrer, and joinder therein.

Lush (*Philbrick* with him), in support of the demurrer. The 3 & 4 Wm. IV., c. 98, § 7, exempted from the operation of the usury law bills of exchange and promissory notes payable at or within three months after date. The 7 Wm. IV. & 1 Vict. c. 80 extended the exemption to bills and notes not having more than twelve months to run. That enactment was continued by the 2 & 3 Vict. c. 37, § 1, which excepted from its operation loans on the security of land. The 17 & 18 Vict. c. 90, which passed in the year 1854, entirely repealed the usury law. This plea is bad for not alleging that the original bills were given while the usury law was in force. *Thibault v. Gibson*.¹ But even assuming that they were, the bills declared on were given after the usury law was repealed, and therefore they are not affected by the previous illegal contract. [MARTIN, B. The 12 Anne, Stat. 2, c. 16, rendered an usurious contract utterly void; then what consideration is there for the new bills?] By the second section of the 17 & 18 Vict. c. 89, it is provided “that nothing herein contained shall prejudice or affect the rights or remedies of any person, or diminish or alter the liabilities of any person, in respect of any act done previously to the passing of this act.” Therefore, as the original bills were void at the time they were given, they could not now be enforced; but the receipt of money which the defendant was under a moral obligation to repay is a sufficient consideration to support a new contract after the usury law was repealed. *Barnes v. Hedley* decided that, after usurious securities given for a loan have been destroyed by mutual consent, a promise by

¹ 12 M. & W. 88.

the borrower to repay the principal and legal interest is founded on a sufficient consideration, and is binding. *Wicks v. Gogerley*¹ is an authority to the same effect. So in *Wright v. Wheeler*,² where an obligee cancelled a bond by which usurious interest was payable, and the obligor gave him another bond for principal and legal interest only, Lawrence, J., ruled that it was valid. [MARTIN, B. It appears by the report in Campb. 157, that *Barnes v. Hedley* was first tried before Chambre, J.; and he ruled that, if money is lent at usurious interest, a subsequent contract to repay the principal with legal interest was void under the 12 Anne, Stat. 2, c. 16.] Though the contract is void, the original debt is a sufficient consideration to support a new promise. [POLLOCK, C. B., referred to *Fitzroy v. Gwillim*.³] *Mather v. Lord Maidstone*⁴ shows that a person may be liable on a new security, although the one for which it was substituted could not be enforced against him.

Macnamara, in support of the plea. At the time the original bills were given an usurious contract was not only void but also illegal, for the person who received money under it was subject to a penalty of treble the value. The 3 & 4 Wm. IV., c. 98, § 7, and 7 Wm. IV. & 1 Vict. c. 80, do not affect this question, because they only created an exemption in certain cases from the penalties imposed by the 12 Anne, Stat. 2, c. 16; and therefore it is sufficient for the defendant to show that the contract was usurious within that statute, and if the plaintiff relies on the exemption, that should come by way of replication. *Thibault v. Gibson*, *Washbourn v. Burrows*,⁵ *Derry v. Toll*.⁶ It appears that the bills declared on were drawn and accepted in the years 1855 and 1856, and therefore after the usury law was repealed by the 17 & 18 Vict. c. 90; but the plea shows that they were accepted to secure the payment of money lent upon an usurious contract, and secured by bills given while the usury law was in force. Therefore the substituted bills were tainted with the original usurious contract, and, that being void, there was no consideration for them. The case falls within the second section of the 17 & 18 Vict. c. 90, which preserves all rights and liabilities in respect of transactions previous to that act. There is no new contract, but merely a renewed security for payment of money under an usurious contract. [WILDE, B. If, before the usury law was repealed, the parties to an usurious contract destroyed the securities and made a new contract to pay the principal and legal interest, that contract was valid; then why is not a new contract valid since the usury law has been altogether repealed?] *Barnes v. Hedley* is distinguishable on two grounds: first, the destruction of the usurious securities by mutual consent was a sufficient consideration to support a new promise; and, secondly, the promise was to pay the principal and legal interest. Here the bills declared on were given to secure payment of the usurious interest. Where a bill of exchange tainted with usury was the

¹ Ry. & M. 123.² 1 Campb. 165, note.³ 1 T. R. 153.⁴ 18 C. B. 273.⁵ 1 Exch. 107.⁶ 5 Exch. 741.

hands of an innocent holder, and, on being informed of the usury, he took a fresh bill in lieu of it, drawn by one of the parties to the usurious contract, and accepted by a third person for his accommodation, it was held that the holder could not maintain an action against the acceptor of the substituted bill. *Chapman v. Black*.¹ [POLLOCK, C. B. If the innocent holder of a promissory note, made for an usurious consideration, took from the maker of it a bond for payment of the amount, the bond was valid. *Cuthbert v. Haley*.² CHANNELL, B. The 58 Geo. III., c. 93, enacts that no bill of exchange or promissory note given upon an usurious contract shall be void in the hands of an indorsee for valuable consideration without notice.] *Cuthbert v. Haley* does not support the proposition contended for. There the Court expressed an opinion that a substituted security given for a security tainted with usury is void, if given to a party to the original contract. *Wicks v. Gogerley* is an authority in favor of the defendant, for it decided that a new promise to pay the principal originally lent on an usurious agreement is invalid, unless all payments beyond legal interest are repaid or deducted. Here the substituted security is for the principal and usurious interest. The receipt of the money under the usurious contract is no consideration for a new promise to pay it. There is a distinction between cases where there is a moral consideration for payment of a debt not enforceable at law, as where an infant after attaining his majority promises to pay a debt contracted during infancy, and where a statute has expressly declared that a particular contract shall be illegal and void. In the former case the duty constitutes a sufficient consideration for a promise to pay the debt; but in the latter, the contract being declared void and an offence at law, there can be no consideration for any new promise.

Cur. adv. vult.

The learned judges having differed in opinion, in the ensuing Term (May 8) the following judgments were delivered:—

MARTIN, B. This is a demurrer to a plea. The action is upon several bills of exchange. The plea is that, before the making of the bills declared on, it was corruptly and against the form of the statutes agreed between the plaintiff and the defendant and one Robinson that the plaintiff should lend them 1,500*l.*, and that he should forbear and give day of payment to them until a future day, and that for such forbearance they should pay to him more than lawful interest at the rate of 5*l.* per cent. per annum upon the sum so lent and forborne, and that for securing the repayment of the said sum of 1,500*l.* and interest, the defendant and Robinson should accept and deliver to the plaintiff certain bills of exchange drawn by the plaintiff upon them, whereby they engaged to pay to the plaintiff or his order 1,600*l.* ten weeks after the date thereof and of the loan; that in pursuance of the said unlawful agreement the plaintiff made the loan, and the defendant and

¹ 2 B. & Ald. 588.

² 8 T. R. 390.

Robinson accepted the bills, and that save as above there was no consideration for these acceptances; that these bills of exchange were dishonored at maturity, and the bills of exchange declared on were given, after the passing of the Statute 17 & 18 Vict. c. 90, by way of renewal of the said first-mentioned bills, and accepted to secure the payment to the plaintiff of the money secured by the first-named bills so given to the plaintiff and the said usurious interest, and that save as aforesaid there was not any value or consideration for the acceptance by the defendant of the bills sued on.

The plea disclosed this state of things, viz., that, when the loan was made and the first bills of exchange given, the statute 12 Anne, Stat. 2, c. 16, was in operation, but that when the bills of exchange declared on were given the statute 17 & 18 Vict. c. 90, had passed. The latter statute repeals the statute of Anne; but the second section provides that nothing in it shall prejudice or affect the rights or remedies, or diminish or alter the liabilities of any person in respect of any act done previous to its passing. The original loan and bills of exchange were therefore left unaffected by it. The statute of Anne enacts that no person upon any contract shall take for a loan of money above 5*l.* per cent. for a year, and that all contracts for payment of any principal so lent shall be utterly void, and that any person who shall take above 5*l.* per cent. for a year shall forfeit and lose for such offence treble the value of the money lent. The loan was therefore an illegal transaction, and the original contract to repay it and the bills of exchange given for it were utterly void; and the plea states that save these there was no other consideration for the bills declared on.

It is quite clear that a bill of exchange is a simple contract; it and promissory notes differ from other simple contracts in this, that *prima facie* they import consideration; but when it is proved that there was no consideration, or an illegal one, the bill of exchange or note is of no avail. It does seem superfluous to cite any authority for the above positions, but in my brother Byles's book upon Bills, page 111 (8th edition), it is stated that the defendant is at liberty in all cases (when the issue raised admits of it) to show affirmatively, by his own witnesses, absence or failure of consideration; and again, page 124, the consideration given for a bill must not be illegal; and at page 132, if part of the consideration of a bill be illegal, the instrument is vitiated altogether; and at page 288 usury is said to be an indictable misdemeanor at common law, for which Comyns's Digest, title Usury, is cited. Now the consideration for the bills declared on was the usurious loan, and the bills of exchange given to secure it. But the statute of Anne has declared these to be utterly void; and, speaking for myself, I cannot understand how an utterly void and illegal contract or transaction can be a legal consideration for a new contract. But the case does not rest here; for at page 294 the same learned author states that if an usurious bill be in the hands of a holder who was a party to the usurious transaction, and he gives it up for a substituted security, the

original usurious taint infects the subsequent security, and either is void. Now, applying the above statement of the law, the consequence seems to me inevitable that the bills of exchange sued on are not of avail in the hands of the plaintiff, who was the usurious lender, and that the plea is good.

But a case of *Barnes v. Hedley* was cited. According to the statement in the report, a person called Webb had agreed to lend money at 5*l.* per cent. interest, but with a proviso that he should also receive a commission of 5*l.* per cent. upon sugars to be bought of him or provided by him, and certain deeds and securities were given to him to secure the balance due. It was admitted at the trial that this was an usurious contract, but it was proved that in consequence of its being intimated to Webb that it was so, it was agreed that Webb should make out fresh accounts, leave out all the usurious charges, charge only for the principal money and legal interest, and that the original deeds and securities in the possession of Webb should be given up and cancelled. Webb accordingly made out such fresh accounts, in which he omitted the usurious charges, and the balance sought to be recovered in the action was composed of the principal moneys actually advanced, with lawful interest fairly and legally calculated, the whole commission and every objectionable charge being omitted. The account was delivered to the debtor, who acknowledged the balance and promised to pay it, and thereupon the deeds and securities originally given to Webb were produced and cancelled and burnt in the presence of the debtor. The Court of Common Pleas held that the balance so arrived at and promised to be paid was recoverable at law, and so certified to the Lord Chancellor, the case being an issue from chancery. I cannot myself see the application of this case to the present. If it had appeared upon the record that the plaintiff and defendant had accounted together and struck off the usurious interest, and the latter had given the bills declared on for the amount of the original loan and legal interest, it would have been an authority in favor of the plaintiff; but nothing of the kind appears upon the plea: indeed the contrary appears, for the bills declared on are stated to have been given to secure the payment to the plaintiff of the money secured by the bills of exchange given to him in furtherance of the illegal and corrupt contract, and that there was no other consideration for them. The case has been put thus: That when the bills declared on were given, there was no usury law, and it was competent for the defendant to pay or contract to pay interest to any extent, and that the bills were lawful, assuming them to have been given for a loan then made. This is quite true, but it has no application to the real and true case under consideration. There was no loan after the repealing statute was passed. There was no correction of the original unlawful transaction. There is nothing whatever shown on the record except bills given upon and in respect of a transaction which the law had declared to be utterly void, and which at one time seems to have been considered an indictable crime.

Another case was cited, *Wright v. Wheeler*, which will be found in a note to *Barnes v. Hedley*. This was an action upon a bond. There had been an usurious contract, but afterwards the parties agreed that some usurious interest which had been paid should be deducted from the principal, and a bond given for the balance of the principal, with lawful interest. Mr. J. Lawrence was of opinion at *nisi prius* that the bond was lawful. The parties, he said, had rectified their error, and substituted for an illegal contract one which was fair and legal. The case has no bearing upon the present. There is here no substitution of a legal contract for an illegal one; it is a mere continuance of the old unlawful contract. *Cuthbert v. Haley* is to the same effect.

A case of *Wicks v. Gogerley* was also cited by the leading counsel for the plaintiff; but according to the statement of the law laid down there by C. J. Best, the plaintiff is not entitled to recover. He says the principle is, that where parties to an usurious agreement "state an account and agree upon the sum which would be due for principal and legal interest, after deducting all that has been paid beyond legal interest, and a fresh promise is made to pay that sum, such promise is free from the original usury and is perfectly valid in law. But, in order to bring this case within the principle, all beyond legal interest must be repaid or deducted." In the report of *Barnes v. Hedley* in 1 Campbell, which I have before referred to, there is a judgment of Mr. J. Chambre, which seems to me to be well worthy of consideration by any one who desires to ascertain what is the true law upon this subject. There is also a case which was not mentioned in the argument, *Preston v. Jackes*,¹ which was tried before Mr. J. Holroyd, who held that a party could not recover on a note which operated as a security for any usurious interest. This case seems to me in point for the defendant; and any opinion of Mr. J. Holroyd, wherever given, is entitled to the greatest weight and is of the highest authority.

The result is, that in my opinion an usurious loan within the statute of Anne, and usurious interest contracted to be paid for it, is not a good consideration for a bill of exchange, and that a bill given upon such consideration is not of avail; and this opinion does not contravene the case of *Barnes v. Hedley*, reported in 2 Taunton, or any other case or authority which I have met with or has been referred to; but on the contrary, in my opinion, is in conformity with them all.

POLLOCK, C. B. The judgment which I am about to deliver is that of my brother WILDE and myself.

My brother MARTIN having stated the pleadings, it is not necessary to repeat them.

The real question raised by this demurrer is, whether there is a good consideration for the bills declared upon. The original bills were given for an advance of money with usurious interest at a time when such a transaction was forbidden by law, and were therefore void and of no legal obligation.

¹ 2 Stark. 237.

The bills sued on were given since the repeal of the usury law, and at a time when the giving or confirming an obligation to pay any amount of interest, however high, was perfectly legal and binding.

But the altered law did not render valid the original bills; they were void when given, and remained void and of no legal obligation up to the time when they were renewed by the bills in question.

The original bills therefore could not form a legal consideration for those now sued upon; indeed there was, when the fresh bills were given, no legal obligation whatever upon the defendant to repay a single farthing of the large advance he had received. But for that advance he has voluntarily given those bills, and whether the law will permit and enforce such a contract is the question.

During the existence of the usury laws the courts of law were bound to enforce them, — to deal with interest above the statute rate as an unlawful and forbidden thing, — and to discover and defeat all attempts, direct or indirect, to give or enforce it.

But the legislature has since repealed the laws against usury, and upon a fuller and wider view of public policy declared the rate of interest on loans to be unlimited and free.

The courts of law are bound with equal fidelity to give effect to this new and opposite view of the legislature. Interest above 5*l.* per cent. should no longer be regarded as of necessity illegal or unrighteous, and no facility should be given to escape from an obligation to repay a real advance of money, or evade a contract willingly made, though interest should have been contracted for at a rate which used to be called usurious.

We make these remarks, because in argument the expression “taint of an usurious transaction” was often repeated, and the court was pressed in language, commonly and properly used while the usury laws were in force, to give no countenance to a contract of which the origin was an advance of money with more than 5*l.* per cent. interest.

Such remarks have no application to or bearing on a contract made like that in question since the usury laws have been repealed.

We therefore pass them by to consider the true question in the case, viz., whether an advance of money under such circumstances as to create no legal obligation at the time to repay it can constitute a good consideration for an express promise to do so.

Such a consideration has been sometimes called a moral consideration. And we think unfortunately so; for the term used as a definition tends to include too wide a range of objects.

And there are many conjunctures in which a man may feel himself morally bound to pay money and promise to do so, which the law would not recognize as forming a good consideration.

But a loan of money is a very different thing. The very name of a loan imports that it was the understanding and intention of both parties that the money should be repaid.

And though at the time of the advance the law, for reasons of pub-

lic policy, forbid any liability, and incapacitate the parties from making a binding contract, there is no reason why a binding contract should not be made afterwards if the legal prohibition be removed.

And the consideration which would have been sufficient to support the promise, if the law had not forbidden the promise to be made originally, does not cease to be sufficient when the legal restriction is abrogated.

There is therefore reasonable ground, as it seems to us, for this qualified proposition, viz., that a man by express promise may render himself liable to pay back money which he has received as a loan, though some positive rule of law or statute intervened at the time to prevent the transaction from constituting a legal debt.

There is likewise authority for it. The general doctrine within which such proposition falls is, we believe, first found promulgated in Lord Mansfield's time. It is the subject of a long note to the report of the case of *Wennall v. Adney*.¹ It has been the subject of much discussion in many subsequent cases. It was stated most widely, and perhaps too widely, in the case of *Lee v. Muggeridge*. And it has consequently been much qualified and sometimes disparaged since: see *Eastwood v. Kenyon*, *Beaumont v. Reeve*, *Cocking v. Ward*.²

But it was repeated and stated to be undoubted law by Baron Parke, in *Earle v. Oliver*,³ who says: "The strict rule of the common law was no doubt departed from by Lord Mansfield in *Hawkes v. Saunders* and *Atkins v. Hill*. The principle of the rule laid down by Lord Mansfield is, that where the consideration was originally beneficial to the party promising, yet if he be protected from liability by some provision of the statute or common law meant for his advantage, he may renounce the benefit of that law; and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by law to perform it. There is a very able note to the case of *Wennall v. Adney*⁴ explaining this at length. The instances given to illustrate the principle are, amongst others, the case of a debt barred by certificate and by the Statute of Limitations, and the rule in these instances has been so constantly followed that there can be no doubt that it is to be considered as the established law."

The case of *Fitzroy v. Gwillim*⁵ is an example of the view that has been taken of the subject even in a court of law; but although that case is certainly not law, it is quite true that courts of equity have relieved (where their interference was wanting) only on the terms of the principal and legal interest being paid.

We think the view we have taken receives considerable support from the case of *Barnes v. Hedley*, which, if not a direct authority for the plaintiff, is somewhat similar in its circumstances; the usurious interest was in that case struck out, but now, since the repeal of the statute of Anne, there is nothing unlawful in usurious interest. Here the defend-

¹ 3 Bos. & P. 249.

² 1 C. B. 870.

³ 2 Exch. 71, 89.

⁴ 3 Bos. & P. 247.

⁵ 1 T. R. 153.

ant says, "I could not then make the promise. I can now, and I am willing to do so."

The plaintiff is therefore, in our opinion, entitled to the judgment of the Court. *Judgment for the plaintiff.*¹

SHIPPEY v. HENDERSON.

SUPREME COURT OF NEW YORK, MAY TERM, 1817.

[Reported in 14 Johnson, 178.]

THIS was an action of assumpsit. The declaration contained counts for goods sold and delivered, and for money had and received, in which the promises were laid on the 1st of May, 1815. The defendant pleaded, 1. *Non assumpsit*. 2. That, after making the supposed promises mentioned in the declaration, and before the exhibiting the plaintiff's bill, on the 15th of February, 1812, the defendant was an insolvent debtor, within the meaning of the insolvent act of April 3, 1811, and had been prosecuted, &c., that he presented a petition, &c., and that, on the 16th of May, 1812, his discharge was granted. To the second plea the plaintiff replied, that the defendant, after obtaining his discharge, and before the commencement of this suit, to wit, on the 1st of May, 1815, at, &c., assented to, and then and there rectified, renewed, and confirmed, the several promises and undertakings in the plaintiff's declaration mentioned. To this replication there was a general demurrer, and joinder in demurrer.

Skinner, in support of the demurrer, contended, that the plaintiff ought to have declared specifically on the new promise, not on the original undertaking. It is a general rule in pleading to set forth the promise, as well as the liability of the defendant, and in this respect there is no distinction between an implied and an express promise; for the law does not create the promise in any case, though it may afford evidence sufficient for a jury to find a promise.² The prior debt, or moral obligation, is the consideration for the new promise. The debt of a bankrupt, or insolvent, who has obtained his certificate, remains due in conscience, and that is sufficient to support a new promise, by which the old debt is revived.³ In all such cases, the declaration must state the new assumpsit. There is no cause of action until the new promise is

¹ See *Goulding v. Davidson*, 26 N. Y. 604; *Stafford v. Bacon*, 1 Hill, 532, 25 Wend. 384; *Hemphill v. McClimans*, 24 Penn. St. 367; *Paul v. Stackhouse*, 38 Penn. St. 302. — Ed.

² Bac. Abr. Assumpsit (F.); 6 Mod. 131; 1 Ld. Raym. 538; 2 Hen. Bl. 563, note a.; 1 Chitty Pl. 299.

³ Cowper, 290, 544; 2 Term Rep. 765, 766; *Scouton v. Eislord*, 7 Johns. Rep. 36; 2 Johns. Rep. 279.

made. The discharge puts an end to all legal and equitable obligation, and there is no existing promise or undertaking which a court of law will enforce, until it is renewed by a new promise. The obligation in conscience merely affords the consideration of the subsequent promise.

The only exception to the rule of pleading for which we contend, is that of infancy, and the only authority for that is *Chitty*. But the contract of an infant is not void, but voidable only.¹ As to the Statute of Limitations, it does not destroy the right of action, but merely suspends it. The debt remains, but the remedy is gone.² But in that case the new promise must be stated technically, and the bare acknowledgment of the defendant within the six years, which is tantamount to a new promise, supports the issue.³

Admitting, however, that the plaintiff might declare on the original undertaking, yet the replication, which gives the cause of action, ought to state the new promise. The plaintiff says merely, that the defendant, afterwards, to wit, on the 1st of May, 1815, assented to, and renewed and confirmed the promises laid in the declaration.

Talcot, contra. The case of infancy is stronger than the present, as to the necessity of stating technically a new promise; for, in that case, there never was any promise binding in law. Here was a previous promise valid in law; an existing cause of action. There is no departure in this case. The replication supports the declaration. The word "renewed," is sufficiently expressive. To renew a promise, is to promise over again.

In *Williams v. Dyde*,⁴ where a bankrupt had been discharged, and the plaintiff declared generally on the original undertaking, and the defendant pleaded his discharge, Lord Kenyon held the declaration to be good, and that a subsequent promise to pay might be given in evidence to support it. This case was recognized in *Leaper v. Tatton*,⁵ and the principle is adopted and laid down by *Chitty*⁶ and other writers.⁷ In *Maxim v. Morse*,⁸ decided in the Supreme Court of Massachusetts, the plaintiff brought an action of debt on a judgment, and the defendant pleaded his discharge under a commission of bankruptcy, and the plaintiff replied, that the defendant afterwards waived the benefit of his certificate, and promised to pay the amount of the judgment, and the defendant rejoined, denying such promise, on which issue was taken; and on motion in arrest, after verdict for the plaintiff, the Court gave judgment for him, considering the declaration as good, and well supported by the replication.

THOMPSON, C. J., delivered the opinion of the Court. The question that arises in this case is, whether the plaintiff may declare upon the original cause of action, or whether he is bound to declare specially

¹ 3 Burr. 1794.

² 5 Burr. 2628.

³ *Bryan v. Heneman*, 4 East's Rep. 599.

⁴ *Peake's N. P. Cases*, 68.

⁵ 16 East, 420.

⁶ 1 *Chitty's Pl.* 40.

⁷ 1 *Selwyn's N. P.* 219; 1 *Cook's B. L.* 256; *Lawes on Assumpsit*, 241.

⁸ 8 *Mass. Rep.* 127.

upon the new promise. I think the proper way is to declare on the original cause of action. I see no reason why this case should differ from that of infancy, or that where the action is barred by the Statute of Limitation.

The discharge under the insolvent act does not make the original contract void; it is expressly laid down by Chitty, that where a debt is barred by a certificate of bankrupt, a promise made afterwards by the bankrupt will support an action, and that it is sufficient in such case to declare upon the original consideration. Such promise can only revive a precedent good consideration, the remedy having been suspended by the discharge. (3 Bos. and Pul. 250, n. 7).

The new promise is sufficiently laid by the words ratified, renewed, and confirmed. The words "renewed the said several promises," are peculiarly appropriate, and amply sufficient.

The replication is no departure from the declaration, but fortifies and supports it, by answering and removing the bar interposed by the plea. We are, accordingly, of opinion that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

DANIEL MILLS v. SETH WYMAN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER TERM, 1825.

[Reported in 3 Pickering, 207.]

THIS was an action of assumpsit brought to recover a compensation for the board, nursing, &c., of Levi Wyman, son of the defendant, from the 5th to the 20th of February, 1821. The plaintiff then lived at Hartford, in Connecticut; the defendant, at Shrewsbury, in this State. Levi Wyman, at the time when the services were rendered, was about twenty-five years of age, and had long ceased to be a member of his father's family. He was on his return from a voyage at sea, and being suddenly taken sick at Hartford, and being poor and in distress, was relieved by the plaintiff in the manner and to the extent above stated. On the 24th of February, after all the expenses had been incurred, the defendant wrote a letter to the plaintiff, promising to pay him such expenses. There was no consideration for this promise, except what grew out of the relation which subsisted between Levi Wyman and the defendant; and Howe, J., before whom the cause was tried in the Court of Common Pleas, thinking this not sufficient to support the action, directed a nonsuit. To this direction the plaintiff filed exceptions.

J. Davis and *Allen*, in support of the exceptions. The moral obligation of a parent to support his child is a sufficient consideration for an express promise. *Andover, &c. Turnpike Corp. v. Gould*, 6 Mass.

40; Andover v. Salem, 3 Mass. 438; Davenport v. Mason, 15 Mass. 94; 1 Bl. Comm. 446; Reeve's Dom. Rel. 283. The arbitrary rule of law, fixing the age of twenty-one years for the period of emancipation, does not interfere with this moral obligation, in case a child of full age shall be unable to support himself. Our Statute of 1793, c. 59, requiring the kindred of a poor person to support him, proceeds upon the ground of a moral obligation.

But if there was no moral obligation on the part of the defendant, it is sufficient that his promise was in writing, and was made deliberately, with a knowledge of all the circumstances. A man has a right to give away his property. [PARKER, C. J. There is a distinction between giving and promising.] The case of Bowers v. Hurd, 10 Mass. 427, does not take that distinction. [PARKER, C. J. That case has been doubted.] Neither does the case of Packard v. Richardson, 17 Mass. 122; and in this last case (p. 130) the want of consideration is treated as a technical objection.

Brigham, for the defendant, furnished in vacation a written argument, in which he cited Fowler v. Shearer, 7 Mass. 22; Rann v. Hughes, 7 T. R. 350, note; Jones v. Ashburnham, 4 East, 463; Pearson v. Pearson, 7 Johns. 26; Schoonmaker v. Roosa, 17 Johns. 301; the note to Wennall v. Adney, 3 Bos. & Pul. 249; Fink v. Cox, 18 Johns. 145; Barnes v. Hedley, 2 Taunt. 184; Lee v. Muggeridge, 5 Taunt. 36. He said the case of Bowers v. Hurd was upon a promissory note, where the receipt of value is acknowledged; which is a privileged contract. Livingston v. Hastie, 2 Caines, 246; Bishop v. Young, 2 Bos. & Pul. 79, 80; Pillans v. Mierop, 3 Burr. 1670; 1 Wms. Saund. 211, note 2.

The opinion of the Court was read, as drawn up by

PARKER, C. J. General rules of law established for the protection and security of honest and fair-minded men, who may inconsiderately make promises without any equivalent, will sometimes screen men of a different character from engagements which they are bound *in foro conscientiae* to perform. This is a defect inherent in all human systems of legislation. The rule that a mere verbal promise, without any consideration, cannot be enforced by action, is universal in its application, and cannot be departed from to suit particular cases in which a refusal to perform such a promise may be disgraceful.

The promise declared on in this case appears to have been made without any legal consideration. The kindness and services towards the sick son of the defendant were not bestowed at his request. The son was in no respect under the care of the defendant. He was twenty-five years old, and had long left his father's family. On his return from a foreign country, he fell sick among strangers, and the plaintiff acted the part of the good Samaritan, giving him shelter and comfort until he died. The defendant, his father, on being informed of this event, influenced by a transient feeling of gratitude, promised in writing to pay the plaintiff for the expenses he had incurred. But he

has determined to break this promise, and is willing to have his case appear on record as a strong example of particular injustice sometimes necessarily resulting from the operation of general rules.

It is said a moral obligation is a sufficient consideration to support an express promise; and some authorities lay down the rule thus broadly; but upon examination of the cases we are satisfied that the universality of the rule cannot be supported, and that there must have been some pre-existing obligation, which has become inoperative by positive law, to form a basis for an effective promise. The cases of debts barred by the Statute of Limitations, of debts incurred by infants, of debts of bankrupts, are generally put for illustration of the rule. Express promises founded on such pre-existing equitable obligations may be enforced; there is a good consideration for them; they merely remove an impediment created by law to the recovery of debts honestly due, but which public policy protects the debtors from being compelled to pay. In all these cases there was originally a *quid pro quo*, and according to the principles of natural justice the party receiving ought to pay; but the legislature has said he shall not be coerced; then comes the promise to pay the debt that is barred, the promise of the man to pay the debt of the infant, of the discharged bankrupt to restore to his creditor what by the law he had lost. In all these cases there is a moral obligation founded upon an antecedent valuable consideration. These promises, therefore, have a sound legal basis. They are not promises to pay something for nothing; not naked pacts, but the voluntary revival or creation of obligations which before existed in natural law, but which had been dispensed with, not for the benefit of the party obliged solely, but principally for the public convenience. If moral obligation, in its fullest sense, is a good substratum for an express promise, it is not easy to perceive why it is not equally good to support an implied promise. What a man ought to do, generally he ought to be made to do, whether he promise or refuse. But the law of society has left most of such obligations to the *interior* forum, as the tribunal of conscience has been aptly called. Is there not a moral obligation upon every son who has become affluent by means of the education and advantages bestowed upon him by his father, to relieve that father from pecuniary embarrassment, to promote his comfort and happiness, and even to share with him his riches, if thereby he will be made happy? And yet such a son may, with impunity, leave such a father in any degree of penury above that which will expose the community in which he dwells to the danger of being obliged to preserve him from absolute want. Is not a wealthy father under strong moral obligation to advance the interest of an obedient, well-disposed son, to furnish him with the means of acquiring and maintaining a becoming rank in life, to rescue him from the horrors of debt incurred by misfortune? Yet the law will uphold him in any degree of parsimony, short of that which would reduce his son to the necessity of seeking public charity.

Without doubt there are great interests of society which justify withholding the coercive arm of the law from these duties of imperfect obligation, as they are called; imperfect, not because they are less binding upon the conscience than those which are called perfect, but because the wisdom of the social law does not impose sanctions upon them.

A deliberate promise in writing, made freely and without any mistake, one which may lead the party to whom it is made into contracts and expenses, cannot be broken without a violation of moral duty. But if there was nothing paid or promised for it, the law, perhaps wisely, leaves the execution of it to the conscience of him who makes it. It is only when the party making the promise gains something, or he to whom it is made loses something, that the law gives the promise validity. And in the case of the promise of the adult to pay the debt of the infant, of the debtor discharged by the Statute of Limitations or bankruptcy, the principle is preserved by looking back to the origin of the transaction, where an equivalent is to be found. An exact equivalent is not required by the law; for there being a consideration, the parties are left to estimate its value: though here the courts of equity will step in to relieve from gross inadequacy between the consideration and the promise.

These principles are deduced from the general current of decided cases upon the subject, as well as from the known maxims of the common law. The general position, that moral obligation is a sufficient consideration for an express promise, is to be limited in its application to cases where at some time or other a good or valuable consideration has existed.

A legal obligation is always a sufficient consideration to support either an express or an implied promise; such as an infant's debt for necessities, or a father's promise to pay for the support and education of his minor children. But when the child shall have attained to manhood, and shall have become his own agent in the world's business, the debts he incurs, whatever may be their nature, create no obligation upon the father; and it seems to follow, that his promise founded upon such a debt has no legally binding force.

The cases of instruments under seal and certain mercantile contracts, in which considerations need not be proved, do not contradict the principles above suggested. The first import a consideration in themselves, and the second belong to a branch of the mercantile law, which has found it necessary to disregard the point of consideration in respect to instruments negotiable in their nature and essential to the interests of commerce.

Instead of citing a multiplicity of cases to support the positions I have taken, I will only refer to a very able review of all the cases in the note in 3 Bos. & Pul. 249. The opinions of the judges had been variant for a long course of years upon this subject, but there seems to be no case in which it was nakedly decided, that a promise to pay the

debt of a son of full age, not living with his father, though the debt were incurred by sickness which ended in the death of the son, without a previous request by the father proved or presumed, could be enforced by action.

It has been attempted to show a legal obligation on the part of the defendant by virtue of our statute, which compels lineal kindred in the ascending or descending line to support such of their poor relations as are likely to become chargeable to the town where they have their settlement. But it is a sufficient answer to this position, that such legal obligation does not exist except in the very cases provided for in the statute, and never until the party charged has been adjudged to be of sufficient ability thereto. We do not know from the report any of the facts which are necessary to create such an obligation. Whether the deceased had a legal settlement in this Commonwealth at the time of his death, whether he was likely to become chargeable had he lived, whether the defendant was of sufficient ability, are essential facts to be adjudicated by the court to which is given jurisdiction on this subject. The legal liability does not arise until these facts have all been ascertained by judgment, after hearing the party intended to be charged.

For the foregoing reasons we are all of opinion that the nonsuit directed by the Court of Common Pleas was right, and that judgment be entered thereon for costs for the defendant.

JOSEPH VALENTINE v. JAMES FOSTER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER TERM, 1840.

[*Reported in 1 Metcalf, 520.*]

INDEBITATUS ASSUMPSIT for money paid, &c. The report of the Chief Justice, before whom the case was tried, was in substance this: The plaintiff was formerly owner of three-eighths of a vessel in his own right, and held two-eighths thereof in his name as trustee for the defendant. An action was brought against the plaintiff and others, as owners of the vessel, for a demand alleged to be due to one Vinal. In the trial of that action, the plaintiff called the defendant as a witness, who was objected to on the ground of interest: whereupon the plaintiff executed and delivered to him a release from all liability to contribution for any sum which might be recovered in that suit, and the defendant gave his testimony. Vinal recovered judgment in that suit, at the March Term of this court in Suffolk, 1836; and the present action was brought to recover a part of the amount paid by the plaintiff in satisfaction of that judgment.

To maintain the action, the plaintiff offered to prove that after the

trial of Vinal's said action, it appearing that the defendant's testimony was of little importance, the plaintiff proposed to the defendant to give him back the release and take no advantage of it; and that the defendant, in reply, said it would make no difference—he would take no advantage of it.

It was admitted that the plaintiff had no other ground to avoid the release, but a subsequent parol promise without any new consideration.

A nonsuit was entered, subject to the opinion of the whole Court.

H. H. Fuller, for the plaintiff. A promise to pay a debt once due operates as a waiver of any mere legal discharge. The original debt, when not in fact paid, constitutes a continuing moral obligation which is a sufficient consideration for such promise. Chit. Con., Perkins's ed., 40, and cases there cited. In *Willing v. Peters*, 12 S. & R. 177, a debtor, after he had been released on paying a part of the debt, was held liable on his promise to pay the balance. *A fortiori*, it would seem, is the defendant in this case liable on his promise, as he paid nothing for his release.

Welch, for the defendant. In *Willing v. Peters* the release was executed at the request and for the benefit of the defendant; which distinguishes it from the present case.

The doctrine of moral obligation, as properly understood, and as illustrated by recent decisions, does not apply to the defendant's promise. See 3 Bos. & Pul. 249, note; Chit. Con., Perkins's ed., 42; *Littlefield v. Shee*, 2 Barn. & Adolph. 811; *Meyer v. Haworth*, 8 Adolph. & Ellis, 467; *Smith v. Ware*, 13 Johns. 257; *Mills v. Wyman*, 3 Pick. 207; *Cook v. Bradley*, 7 Conn. 57; *Loomis v. Newhall*, 15 Pick. 159; *Hawley v. Farrar*, 1 Vt. 420.

It is against the policy of the law that the promise in this case should be enforced.

SHAW, C. J. The single question in this case is, whether a pre-existing liability to contribution, voluntarily released by the party to whom it is due to the party liable, in order to qualify him as a witness in a trial at law between the releasor and a third party, is a good consideration for a subsequent promise to pay such contribution.

This action is one of new impression, and attempts to carry the doctrine of legal liability, arising upon an express promise made in consideration of moral obligation, somewhat further than it has yet been carried.

It is difficult to reduce this principle to a rule sufficiently accurate for practical use, on account of the looseness and uncertainty attending the notion of moral obligation or moral duty.

In *Mills v. Wyman*, 3 Pick. 207, where the subject was largely discussed, it was attempted to restrain and limit the generality of the principle broadly laid down, that a moral obligation is a sufficient consideration for an express promise, by confining it to cases where there has been some pre-existing legal obligation, which has become inoperative by force of positive law; and the cases of debts barred by

the Statute of Limitations, by a discharge under bankrupt and insolvent laws, and debts incurred by infants, are put by way of illustration. But it is difficult to reconcile all the cases on the subject upon this principle. *Lee v. Muggeridge*, 5 Taunt. 36.

In some other cases another distinction has been somewhat relied on, to wit, when there is or would be a legal obligation, but where the remedy is taken away by positive law, or where the obligor is exempted from legal liability on considerations of policy. The only case I have found, where an action has been held to lie upon an express promise to pay a debt which had been voluntarily released, is that of *Willing v. Peters*, 12 S. & R. 177. It was a case where the debtor, having become insolvent, made an assignment for the benefit of all his creditors, containing a clause of release on the part of the creditors, in consideration of the assignment. A dividend had been received by the plaintiff, the creditor, after which the debtor made an express promise to pay the balance of the debt when he should become able. There, although it was argued that the release was voluntarily made, and though it actually extinguished the whole debt by an instrument under seal, which imported a consideration, yet the analogy was so strong to the case of a discharge under a bankrupt or insolvent law, in which it had always been held that an action might be maintained on an express promise to pay the balance of the debt, that the Court decided in favor of the plaintiff.

But we think there are several considerations which distinguish the present case from that cited.

We are then to consider that, in becoming party to an assignment made by an insolvent debtor, the release is executed at the request and for the benefit of the debtor. And it has an important bearing in all those cases that the discharge or exemption, by which the debtor is held not liable to an action, is created for his benefit. Then applying the rule, that a party may waive an exception made for his benefit, and that he does waive it by an express promise, it affords a strong legal ground for the maintenance of an action upon such express promise. 21 Amer. Jurist, 278 ; 3 Bos. & Pul. 249, note. But in case of a release given in court to qualify a person as witness, the act can in no sense be regarded as done at the request or for the benefit of the releasee. On the contrary, the act is for the benefit of the releasor, that he may have the advantage of the releasee's testimony ; and the understanding in all such cases is, that he prefers relinquishing for ever any actual or contingent claim which he may have upon the releasee, rather than forego the advantage he expects to derive from his testimony.

We also think there is another distinction between the case at bar and the case cited, founded in obvious and strong considerations of policy. A release given to qualify a witness is usually given in open court, in presence of the jury. It must be full and complete, to the satisfaction of the Court ; it is exhibited and represented as an abso-

lute and complete discharge of all interest in the event of the suit. If it should come to be considered that such a release merely took away a legal remedy, that it left the moral obligation subsisting in its full force, and that the legal obligation would be revived by expressions on which it might be left to a jury to find a promise, it would introduce an element of doubt as to the force and effect of such a release. It might well be argued that it was merely formal, and left the witness still substantially interested; and would have a secret injurious effect upon the credit due to released witnesses.

Without therefore giving an opinion in reference to a case where a creditor has executed a release, to enable an insolvent debtor to obtain his discharge under a general assignment, the court are of opinion that, where a release has been voluntarily executed and delivered by a creditor to his debtor, for the express purpose of discharging all interest and qualifying him as a witness for his own benefit, there remains no moral obligation to pay the debt, which is sufficient to afford a consideration for a new promise upon which an action will lie.

*Nonsuit to stand.*¹

SAMUEL O. DEARBORN AND ANOTHER v. FRANCIS
BOWMAN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER TERM, 1841.

[Reported in 3 Metcalf, 155.]

ASSUMPSIT on a note in these terms: "June 17, 1839. I promise to pay Dearborn & Bellows sixty dollars in ninety days, value received. Bowman." Defence: want of consideration. The case came before this Court upon a statement of the testimony given in the trial thereof in the Court of Common Pleas, which the parties agreed should be taken as a statement of the facts of the case. That statement was as follows:—

"The defendant, to show that there was no consideration for the note, introduced Gen. Thomas A. Staples as a witness, who testified that at the democratic county convention held in October, 1837, in the county of Middlesex, the defendant was nominated, as one of the candidates of the democratic party, for election to the State senate from the county of Middlesex, at the following November election; and that at the same convention the witness was chosen a member, and made chairman of the democratic county committee for said county, for the ensuing year; that it was the duty of said committee to procure and cause to be printed and circulated in the county, previous to the elec-

¹ See *Shepard v. Rhodes*, 7 R. I. 470, 474; *Warren v. Whitney*, 24 Maine, 561.—ED.

tion, such papers, addresses and documents, as would best promote the success of the democratic party, and secure the election of its candidates to office; that the plaintiffs, by the request of the witness, furnished extra papers to the amount of \$105 during the months of October and November; and on or about the 16th of November, 1837, they rendered their bill to him for the same, and the bill was charged to, and made out against, the democratic county committee. The witness said it was customary, he believed, for the committee after an election to collect the bills of expenses attending the canvass, and apportion the amount among the candidates of the party, who usually paid their respective proportions; especially if they were elected. The defendant was not elected to the Senate in 1837, but had been the year previous. The witness said that the defendant had not paid any thing on account of the expenses of the election in 1837; that he had never spoken to or had any acquaintance with him until since the commencement of this action; that he had never agreed to pay, nor given the witness to understand that he would pay, any thing on account of said expenses; that there was no subscription paper, or other written or verbal engagement, by which he had promised to pay; that the witness had paid \$142 from his own funds towards defraying the expenses of the election in 1837, and that he had no legal claim upon the defendant or any other person for contribution; that if the defendant should offer to pay him \$60, or any other sum, he should take it. The witness said that the extra papers, furnished by the plaintiffs, [and in part payment of which it is agreed by the parties that the note in suit was given] were furnished by his order; that the plaintiffs had repeatedly called on him as chairman to pay the bill before the date of said note; that the defendant had never requested or authorized him to procure or furnish any printing or papers on his account or credit. He also said he could not say but that he had authorized the plaintiffs to collect of the defendant his proportion of the expenses.

“ Aaron Dow testified that the plaintiffs, or one of them, had often called on the defendant for his share or proportion of the expenses of the election in 1837; that the defendant said he was not bound or was not liable to pay any thing, but would do what was proper, and would pay if it was right that he should. The witness was present when the note in suit was given. The defendant refused to make the note payable to order, because he doubted to whom he was bound to pay it; whether to Staples or the plaintiffs. At the time the note was given, or at one of the times when one of the plaintiffs called on the defendant, he (the plaintiff) said that the plaintiffs had no legal claim against the defendant; and he produced no bill. He said he was authorized to collect of the defendant his proportion of the expenses by the chairman of the county committee.

“ B. E. Hale testified that he was chairman of a committee in 1839, appointed at a convention of the democratic party that year, to collect the arrearages of bills from the candidates for office, and pay the

expenses of the elections held prior to that time; that he wrote to the defendant for his proportion, but received no answer; that he afterwards saw the defendant, conversed with him on the subject, and the defendant said he would pay if it was proper that he should; and in a conversation holden with the defendant subsequently, the defendant said he would pay. The witness after that gave Bellows, one of the plaintiffs, a written order on the defendant for his assessment some time before the date of the note in suit. The witness said he heard Gen. Staples authorize the plaintiffs to collect of the defendant his proportion of the expenses; and the witness said it was customary for the candidates of the party to pay the expenses."

J. G. Abbott, for the plaintiffs.

Buttrick, for the defendant.

SHAW, C. J. The defence to the action to recover the amount of this note is want of consideration. It is manifest from the note itself that it is not a negotiable instrument, being payable neither to order nor to bearer; indeed it appears by the case that the defendant declined making it negotiable. But total want of consideration is a good defence even to an action on a negotiable note, when brought by the promisee against the maker. Then the question is, whether upon the facts shown any consideration appears for this promise. The note was given in consequence of services before that time performed by the plaintiffs, in printing and circulating extra papers and documents, previously to an election of State senators at which the defendant was a candidate. Such services imposed no obligation, legal or moral, on the defendant; and it would be somewhat dangerous to hold that they created any honorary obligation on him to pay for them. Nor would it be aided in a legal view by a previous custom, if proved, for candidates to contribute to the payment of similar expenses, whether successful or otherwise in the election.

Nor were these services performed at the request of the defendant. On the contrary, it appears by the evidence that they were performed by [*sic*] Gen. Staples, chairman of the county committee, who alone was responsible for the payment, and between whom and the defendant there was no privity, nor even any communication until long after the services had been performed. The rule of law seems to be now well settled—though it may have formerly been left in doubt—that the past performance of services constitutes no consideration even for an express promise, unless they were performed at the express or implied request of the defendant, or unless they were done in performance of some duty or obligation resting on the defendant. *Mills v. Wyman*, 3 Pick. 207; *Loomis v. Newhall*, 15 Pick. 159; *Dodge v. Adams*, 19 Pick. 429. As the services performed by the plaintiffs were not done at the request of the defendant, as they were not done in the fulfilment of any duty or obligation resting on him, there was no consideration to convert the express promise of the defendant into a legal obligation.

Another ground, however, was taken in behalf of the plaintiffs, which was, that the discharge by the plaintiffs of their legal demand against Staples was a good consideration for the defendant's promise to them. If such discharge was in fact given, and given at the defendant's request; or if the defendant had promised to pay, if they would discharge Staples *pro tanto*, and they did discharge him; it would have been a good consideration for the defendant's promise. But there is no evidence to establish the fact.

The Court are of opinion that there was no legal consideration for the defendant's promise, and that no action can be maintained upon it.

Plaintiffs nonsuit.

DAVID ILSLEY v. JOHN JEWETT AND OTHERS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, NOVEMBER TERM, 1841.

[*Reported in 3 Metcalf, 439.*]

THIS was an action of debt on a bond for the liberty of the prison limits, and was submitted to the Court on the following facts agreed by the parties:—

In 1814, the plaintiff paid money as surety for John Jewett, one of the defendants, and in 1840 brought a suit against him to recover back the money so paid. Said Jewett, among other defences, relied on the Statute of Limitations. The plaintiff, to meet this part of the defence, proved a part payment by the defendant, in 1839, and by reason thereof recovered judgment against him at November Term, 1840, as stated and shown in the report of the case of *Ilsley v. Jewett*, 2 Met. 168, which is to be considered as part of this case. Said judgment was for the sum of \$349.89 damages, and \$44.95 costs of suit, and the plaintiff took out execution thereon, and caused the defendant to be committed, on said execution, to the jail in Ipswich. Said defendant, and his co-defendants in this suit, as his sureties, thereupon gave bond for the liberty of the prison limits, conditioned (as is required by the Rev. Stats., c. 97, § 63), that he would not go without the exterior limits of the prison until he should be lawfully discharged, &c. But after the giving of said bond, and before the commencement of this suit, and also before he was discharged, he went, several times, without the boundaries of the town of Ipswich.

Defendants to be defaulted, if such going without the boundaries of the town of Ipswich was a breach of the condition of said bond; if not, the plaintiff to become nonsuit.

O. P. Lord, for the plaintiff. By the Rev. Stats., c. 14, § 14, a debtor, committed on execution issuing upon a judgment recovered on a contract made before the 2d of April, 1834, is entitled only to the

limits of the jail yard as established by Stat. 1834, c. 201; viz., the boundaries of the city or town in which the jail to which he is committed is situated. The single question presented by the facts agreed is, therefore, this: Was the judgment recovered by the plaintiff against John Jewett, in 1840, recovered on a contract made in 1814 or in 1839? on the old contract, which arose upon the plaintiff's paying money for him, as his surety, or on the new promise made by him, in 1839, by his making part payment?

The Statute of Limitations bars only the remedy on a contract, and does not discharge the contract itself. Unless a new promise or acknowledgment is made, the remedy is barred from considerations of public policy, laying out of the question any consideration whether the debt be or be not paid. *Per Sedgwick, J.*, 7 Mass. 517; S. P. 13 Mass. 203. But when a new promise or acknowledgment is made, "the contract is not within the intent of the statute." *Baxter v. Penniman*, 8 Mass. 134; *Fiske v. Needham*, 11 Mass. 453. See also *Newlin v. Duncan*, 1 Harring. 204.

A judgment on a demand which is taken out of the operation of the Statute of Limitations by a new promise is recovered on the original contract, and not on the new promise. This appears from various considerations. Thus: In *Cogswell v. Dolliver*, 2 Mass. 223, it was said by Sedgwick, J., that if any articles charged in an account were sold and delivered within six years next before action brought, "they will draw after them the articles beyond six years, and exempt them from the operation of the statute."

An acknowledgment made after action brought will support the action on the original contract. *Yea v. Fouraker*, 2 Bur. 1099. So an acknowledgment by an executor, administrator, or guardian, will bind the estate of the deceased or the ward. *Brown v. Anderson*, 13 Mass. 203; *Emerson v. Thompson*, 16 Mass. 429; *Manson v. Felton*, 16 Pick. 206. So an acknowledgment made to a stranger will prevent the operation of the statute. *Richardson v. Fen*, Lofft, 86; *Mountstephen v. Brooke*, 3 Barn. & Ald. 141; *Peters v. Brown*, 4 Esp. 46; *Harvey v. Tobey*, 15 Pick. 99. And a parol acknowledgment of a contract, required by the Statute of Frauds to be in writing, has the same effect. *Gibbons v. M'Casland*, 1 Barn. & Ald. 690. So an acknowledgment by one joint debtor will bind the others. *Whitcomb v. Whiting*, 2 Doug. 652; *Perham v. Raynal*, 2 Bing. 306; *Johnson v. Beardslee*, 15 Johns. 3; *White v. Hale*, 3 Pick. 291. Even by one partner after a dissolution of the partnership. *Wood v. Braddick*, 1 Taunt. 104; *Simpson v. Geddes*, 2 Bay, 533.

In addition to all these proofs that the original contract has always been regarded as the cause of action, is the universal practice of declaring on the original contract, and the established doctrine that proof of a new promise supports such declaration. *Leaper v. Tatton*, 16 East, 423; *Upton v. Else*, 12 Moore, 304.

Perkins (*Ward* was with him), for the defendants. John Jewett, by

giving the plaintiff a negotiable note in part payment (2 Met. 169), entered into a new contract, and gave the plaintiff a new remedy. "The reason," say Lord Ellenborough and Parke, J., "why a part payment takes a case out of the statute is, that it is evidence of a fresh promise." 1 Barn. & Ald. 93; 3 Barn. & Adolph. 511; S. P. Sigourney v. Drury, 14 Pick. 390, 391; Clark v. Hooper, 10 Bing. 481. A new promise subjects a defendant to the remedy applicable to a new contract. In Presbrey v. Williams, 15 Mass. 194, where part payment had been made on a note, Jackson, J., said, the plaintiff "might have brought his action" on the day of such payment, "as upon the new promise then made." In Little v. Blunt, 9 Pick. 494, Wilde, J., says: "the new promise actually gives the remedy, and is substantially the cause of action." And Richardson, C. J., in Exeter Bank v. Sullivan, 6 N. H. 136, says, "the new promise is not deemed to be a continuance of the original promise, but a new contract supported by the original consideration." S. P. 3 Bing. 643, *per* Gaselee, J., Pittam v. Foster, 1 Barn. & Cres. 250; Tanner v. Smart, 6 Barn. & Cres. 606; Jones v. Moore, 5 Binn. 577; 4 Phil. Ev. (4th Amer. ed.) 138; Bell v. Morrison, 1 Pet. 371. Acknowledgment of a promise by a party, and that he has not performed it, "creates a debt," says Bayley, J., 16 East, 423. These authorities show that a new promise does not operate by way of reviving the old promise or waiving the statute bar, but by creating a fresh contract. There is, at the present day, no difference between promises to pay debts barred by the Statute of Limitations and debts discharged under a bankrupt or insolvent act, or debts contracted during infancy. An express promise is necessary to remove either of these bars. Roberts v. Roberts, 3 Car. & P. 296; Oakes v. Mitchell, 3 Shepley, 360; Moore v. Bank of Columbia, 6 Pet. 86; Sands v. Gelston, 15 Johns. 519. As it regards the Statute of Limitations, there must be a cause of action within six years; and that cause accrues upon the making of a new express promise. The old promise—as in case of a bankrupt or infant—is merely a basis or consideration for the new one. Lonsdale v. Brown, 4 Wash. C. C. 150; Searight v. Craighead, 1 Pennsylv. 138; Mills v. Wyman, 3 Pick. 209, 210. The new promise may be declared on (1 Selw. N. Prius, 4th Amer. ed., 49), which shows that it is a new cause of action. It is, indeed, the common practice, as Lord Ellenborough says, 16 East, 423, to declare on the original contract. "Probably," says Best, C. J., 12 Moore, 304, "the new promise ought in strictness to be declared on specially, but the practice is inveterate the other way." In 3 Bing. 332, he expressed a still stronger opinion. But this practice is anomalous, and is not allowed in suits by executors or administrators. In England, and perhaps in all the States of the Union except Massachusetts and New Hampshire, if an executor or administrator sues for a debt of the deceased, and relies on a new promise to himself to take it out of the Statute of Limitations, he must declare specially on the new promise, or the evidence of such promise will not support the declara-

tion. Stephen Pl. 405, 406; Gould Pl. 453, 454; 2 Stark. Ev. 552, and American cases cited in the notes; 1 Chitty Pl. (6th Amer. ed.) 234, 392. See also *Pittam v. Foster*, 1 Barn. & Cres. 248; Lawes Pl. in Assump. 730-732. In *Baxter v. Penniman*, 8 Mass. 133, and in *Buswell v. Roby*, 3 N. H. 467, it was held, however, that an administrator need not declare on the new promise; and thus the anomaly has been extended further, in this Commonwealth and in New Hampshire, than is known to have been done elsewhere. But whether the one or the other form of declaring is adopted, yet, as said by Wilde, J., "the new promise gives the remedy, and is substantially the cause of action; for without it there was no cause of action." 9 Pick. 492, 494. The statute bar is removed by a new promise, either because the presumption of payment is thereby removed; or because the defendant thereby waives the benefit of the statute; or because a new contract is thereby made, which is supported by the old consideration. The cases that have been cited show that the latter is the only reason which courts now recognize; and therefore, as the new contract gives the remedy, and is the contract on which in effect the judgment is recovered, the defendant, if committed in execution on the judgment, is entitled to the enlarged jail limits; viz., the whole county. Rev. Stats., c. 14, § 13.

SHAW, C. J. In debt on a prison bond given July 14, 1841, the question is, whether the bond was broken by the escape of the prisoner; and this again depends upon the question, what were the prison limits of Ipswich jail, for this prisoner, in 1841? This depends upon Rev. Stats., c. 14, §§ 13, 14, prescribing different limits in different cases. "On executions issuing upon judgments, recovered upon contracts made before the 2d of April, 1834, the limits of each jail shall remain as the same were established previously to that day." § 14. It is conceded that, prior to 1834, the jail limits included a space much less than the bounds of the town of Ipswich. If, then, the contract on which the plaintiff recovered his former judgment, in pursuance of which the defendant was committed, was made prior to the 2d of April, 1834, so that the limits for him were those which existed in 1834, then the defendant made an escape, and the bond was forfeited.

It appears that Adams and Ilsley were sureties for John Jewett on a promissory note; that Adams paid the whole in the first instance; that afterwards Adams demanded of the plaintiff one-half, by way of contribution, as he had a right to do; and the plaintiff paid the same, as he was bound to do. On that payment, the defendant, John Jewett, as principal promisor, became indebted to the plaintiff, and liable to pay him the same amount on demand. This liability arose from the implied promise of the principal, made at the time of the plaintiff's becoming his surety, that, in case the plaintiff should be called on to pay any thing in consequence of such suretyship, the principal would repay the same on demand. [See *Appleton v. Bascom*, 3 Met. 171.]

Afterwards, in 1839, the transaction took place, as stated in 2 Met. 168, which was held by the Court sufficient evidence of part payment

to take the case out of the Statute of Limitations, and the plaintiff had judgment; and the question is, whether this is a judgment recovered on a contract made before April, 1834. The case has been very well argued on both sides, and all the authorities, we believe, fully cited. The Court are of opinion that the judgment must be considered as rendered on the old contract; that a payment, or new promise, or an admission from which a new promise may be inferred, is considered as removing out of the way a bar arising from the Statute of Limitations, so as to enable the creditor to recover notwithstanding the limitation; and not as the creation of a new substantive contract, which is to be the basis of the judgment. We are therefore of opinion that the facts show a breach of this bond, and that the plaintiff is entitled to recover.

Defendants defaulted.

LORIN WAY v. CHARLES SPERRY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER TERM, 1850.

[*Reported in 6 Cushing, 238.*]

THIS was an action of assumpsit, commenced on the 12th of July, 1848, to recover the amount of three promissory notes, signed by the defendant, and indorsed by the several payees thereof to the plaintiff on the day of the commencement of the action. These notes were described in the plaintiff's bill of particulars, as follows: "One dated February 23, 1836, for \$18, payable to Ebenezer Watson, or order, in one year, with interest; one dated March 2, 1838, for \$7.36, payable to Ebenezer Watson and one Flanders, or order, on demand, with interest; and one dated March 14, 1839, for \$18.30, payable to Ebenezer Watson, or order, on demand, with interest."

The defendant pleaded the general issue, and in defence relied on the Statute of Limitations, and a discharge in bankruptcy, dated January 9, 1843, which was duly proved, and by its terms embraced the note in question.

At the trial in the Court of Common Pleas, before *Mellen, J.*, it was in evidence, that the defendant, in May, 1843, left Columbia, in the State of New Hampshire, where the notes were dated, and became an inhabitant of Lowell.

It was also testified by Watson, the payee of the notes, that the defendant, in the year 1845, being then at Claremont, in New Hampshire, said he would pay Watson the notes as soon as he possibly could; that he was not then in a situation to pay them, but that Watson need not give himself any uneasiness, the notes should be paid as soon as possible; that in January, 1846, he again saw the defendant in Lowell, who said, that he was then engaged upon a job of stone-work, and

should have the money in April, and that if Watson would come or send down then, he would pay one half of the notes; but the defendant declined taking up the notes and giving a new one for them.

There was also evidence that the defendant was of ability to pay the notes, but no evidence of any new consideration for his promises to pay them.

The defendant, upon this evidence, contended, that the first described note was barred by the Statute of Limitations; that no action could be maintained on the notes, or on the defendant's new promises, without showing a consideration for the latter; that the promise of the defendant to pay the notes, made subsequently to his discharge in bankruptcy, if available at all, could only support an action in favor of the promisee, and did not revive the negotiable quality of the notes, so as to entitle a subsequent indorsee to maintain an action, either upon the notes or upon the new promise.

But the presiding judge was of opinion, that the action could be maintained upon the evidence, and directed the jury accordingly, who returned a verdict for the plaintiff, whereupon the defendant excepted.

T. Wentworth, for the defendant.

J. G. Abbott, for the plaintiff.

The opinion of the Court was delivered at the October Term, 1851.

METCALF, J. The case of *Bulger v. Roche*, 11 Pick. 36, is a decisive answer to the defence set up by the defendant, under the Statute of Limitations, against the first note specified in the plaintiff's bill of particulars; and the only other point to be decided is, whether the defendant's discharge in bankruptcy is a defence to that and the two other notes in suit.

The plaintiff relies on a promise made to the payee of the notes, by the defendant, since his discharge. And it is well settled, that a distinct and unequivocal promise to pay a debt so discharged, or a promise to pay it on a condition which is afterwards fulfilled, is binding on the promisor, and may be enforced by action. Upon these exceptions, it must be taken that a binding promise by the defendant was proved at the trial. No new consideration was necessary to the validity of the promise; *Chit. Con.* (5th Amer. ed.) 190; *Penn v. Bennett*, 4 Campb. 205; and no statute requires it to be in writing.

But the defendant contends that if he is bound at all by his promise, he is bound only to the payee of the notes, to whom he made it, and that it did not revive or restore the negotiability of the notes. And his counsel cited *Depuy v. Swart*, 3 Wend. 135; *Moore v. Viele*, 4 Wend. 420, and *Walbridge v. Harroon*, 18 Verm. 448, where it was so decided. Since the argument, a similar decision of the court of Maine has been published. *White v. Cushing*, 17 Shepley, 267. The grounds of these decisions, as stated in the report of the first of them, were, that "the new promise is the contract upon which the action must rest;" that "the new promise does not renew the old contract, and renovate the note given on that contract;" that "the existence

of the note is destroyed by the discharge, and cannot be revived and restored to all its former properties by the maker's entering into a new contract, by which he becomes liable to pay what was due on the old contract;" and that "the defendant's liability, therefore, is on the new contract, and that the suit should be in the name of him with whom such contract is made."

We are not satisfied with these grounds of decision. For we take it to be well established that, in actions brought on promises made by infants, and ratified after they come of age; on promises which have been renewed after the Statute of Limitations has furnished a bar; and on unconditional promises by discharged insolvent debtors and bankrupts, to pay debts from which they have been discharged, the plaintiff may declare on the original promise; and that when infancy, the Statute of Limitations, or a discharge in insolvency or bankruptcy, is pleaded or given in evidence, as a defence, the new promise may be replied or given in evidence, in support of the promise declared on; that a replication, alleging such new promise, is not a departure, and that evidence thereof is not irrelevant. And we do not hold that a note, promise, or debt, is "destroyed" by a discharge in bankruptcy. If it were, it not only could not be renewed or revived, but it could not be a consideration for a new promise. Yet nothing is clearer, on authority, than that the old debt is a sufficient consideration for such promise. In all the cases above mentioned, the new promise operates as a waiver, by the promisor, of a defence with which the law has furnished him against an action on the old promise or demand. *Maxim v. Morse*, 8 Mass. 127; *Foster v. Valentine*, 1 Met. 522, 523.

We cannot perceive any legal difference, as to the point now in question, between the case of a debt that has been discharged by a process in bankruptcy, and a claim voidable on the ground of infancy, or barred by the Statute of Limitations. In the latter case, it has been decided that a new promise removes the statute bar, but does not create a new and substantive cause of action which is the basis of a judgment; and that the judgment must be considered as rendered on the old contract. *Ilsley v. Jewett*, 3 Met. 439. And where an infant gave a negotiable note, which he ratified by a new promise after he was of age, it was decided that he was liable on it to an indorsee to whom the payee negotiated it after the ratification. The Court said the ratification gave the contract "the same effect as if the promisor had been of legal capacity to make the note when he made it. This made it a good negotiable note from that time, according to its tenor; of course, when transferred to the plaintiff, he took it as a negotiable note, and may maintain an action on it." *Reed v. Batchelder*, 1 Met. 559. And the indorsement of a note, after a new promise to the payee has taken it out of the Statute of Limitations, enables the indorsee to sue the maker. *Little v. Blunt*, 9 Pick. 488, and 16 Pick. 359. The same rule is applicable to the case at bar. A new promise made to the payee of a negotiable note is a promise to pay him or order, or bearer, according to its tenor.

Exceptions overruled.

BENJAMIN G. DUSENBURY v. MARK HOYT.

NEW YORK COURT OF APPEALS, SEPTEMBER 29, OCTOBER 7, 1873.

[Reported in 53 New York, 521.]

APPEAL from a judgment of the General Term of the Superior Court of the city of New York, affirming a judgment in favor of defendant entered upon a verdict, and affirming order denying motion for a new trial. (Reported below, 45 How. Pr. 147.)

The action was upon a promissory note. The defendant pleaded his discharge in bankruptcy. Upon the trial, after proof of the discharge, plaintiff offered to prove a subsequent promise of the defendant to pay the note. Defendant objected upon the ground that the action was upon the note, not upon the new promise. The Court sustained the objection, and directed a verdict for defendant, which was rendered accordingly.

D. M. Porter for the appellant. It was proper to sue upon the original cause of action, and not upon the new promise. *Clark v. Atkinson*, 2 E. D. S. 112; *Shippey v. Henderson*, 14 J. R. 178; *Stebbins v. Sherman*, 1 Sandf. 510; *Wait v. Morris*, 6 Wend. 394; *Fitzgerald v. Alexander*, 19 id. 402; *McNair v. Gilbert*, 3 id. 344; *Gerry v. Buckner*, 4 N. Y. Leg. Obs. 402; 1 Abb. Forms, 212, note; *Ross v. Hamilton*, 3 Barb. 609; *Watkins v. Stevens*, 4 id. 168; *Wakeman v. Sherman*, 5 Seld. 85; *Turner v. Christman*, 20 Ohio, 339; *Way v. Sperry*, 6 Cush. 239; *Roberts v. Morgan*, 2 Esp. 736; *Williams v. Dyde*, Peake, 68; 1 Chitty's Pl., 40; 1 Selwyn's N. P., 219; *Maxim v. Morse*, 8 Mass. 127; *Trueman v. Fenton*, 1 Smith's L. C., 793; 5 Cowp. 544, 548; *Draper v. Tatton*, 16 East, 420.) A promise to pay the note was a waiver of the discharge. *Depuy v. Swart*, 3 Wend. 141, note *a*; *Stafford v. Bacon*, 1 Hill, 532; 2 Greenl. Ev., § 107; *Chitty on Con.*, 10, 12, 13, 215; *Story on Con.*, §§ 148, 185; *Stearns v. Tappin*, 5 Duer, 294; *Hughes v. Wheeler*, 8 Cow. 77; *Burdick v. Green*, 15 J. R. 247. The new promise could be proved without a reply. Code, § 168; *Hodges v. Hunt*, 22 Barb. 150; *Esselstyn v. Weeks*, 12 N. Y. 635; *Stewart v. Binse*, 10 Bos. 436. Plaintiff's complaint sufficiently alleged the new promise. *Miller v. Potter*, 34 Barb. 358; *Winchell v. Bowman*, 21 id. 448; *Hawley v. Griswold*, 42 id. 18.

Cephas Brainerd for the respondent. The discharge in bankruptcy absolutely discharged the note in suit. *Depuy v. Swart*, 3 Wend. 135, 140; *Stearns v. Tappin*, 5 Duer, 294, and cases cited; *Sturges v. Barton*, 8 Ohio, 215; *White v. Cushing*, 30 Maine, 259, 267; *Carter v. Humboldt F. Ins. Co.*, 12 Iowa, 287, 294; *Walbridge v. Harrison*, 18 Vt. 448; *Fraley v. Kelly*, 67 N. C. 78, 81; *Murphy v. Smith*, 22 La. An. 441; *Sturges v. Crowninshield*, 4 Wheat. 122; *Morse v.*

Gould, 11 N. Y. 281, 288; *Ruggles v. Keller*, 3 J. R. 263. The new promise did not revive the note. *Egbert v. McMichael*, 9 B. Mon. 44; *Mason v. Hinghart*, id. 480; *Depuy v. Swart*, 3 Wend. 135, 140; *White v. Cushing*, 3 Maine, 267, 269; *Wardwell v. Foster*, 31 id. 558; *Clark v. Atkinson*, 2 E. D. S. 112; *Linn v. Decher*, 34 N. J. 305. The new promise being the obligatory contract, the complaint must be founded upon it. *Graham v. Hunt*, 8 B. Mon. 7; *Egbert v. McMichael*, 9 id. 44; *Corson v. Osborne*, 10 id. 155; *Sherman v. Hobart*, 26 Vt. 60, and cases cited; *Van Santvoord's Pl.* (3d ed. by Moak) 207, marg.; *Viele v. Ogilvie*, 2 G. Green, 326; *United Soc., &c., v. Winkley*, 7 Gray, 460; *Stafford v. Bacon*, 1 Hill, 532. The allegation of payment on account is not an allegation of a new promise. *Cambridge v. Littlefield*, 6 Cush. 210; *Merriam v. Bagley*, 1 id. 77; *Stark v. Stimson*, 23 N. H. 259.

ANDREWS, J. The 34th section of the bankrupt law declares that a discharge in bankruptcy releases the bankrupt from all debts provable under the act, and that it may be pleaded as a full and complete bar to all suits brought thereon.

The legal obligation of the bankrupt is by force of positive law discharged, and the remedy of the creditor existing at the time the discharge was granted to recover his debt by suit is barred. But the debt is not paid by the discharge. The moral obligation of the bankrupt to pay it remains. It is due in conscience, although discharged in law, and this moral obligation, uniting with a subsequent promise by the bankrupt to pay the debt, gives a right of action. It was held in *Shippey v. Henderson* (14 J. R. 178), that it was proper for the plaintiff, when the bankrupt had promised to pay the debt after his discharge, to bring his action upon the original demand, and to reply the new promise in avoidance of the discharge set out in the plea. The Court, following the English authorities, said that the replication of the new promise was not a departure from the declaration, but supported it by removing the bar interposed by the plea, and that in point of pleading it was like the cases where the defence of infancy or the Statute of Limitations was relied upon. The case of *Shippey v. Henderson* was followed in subsequent cases, and the doctrine declared in it became, prior to the Code, the settled law. *McNair v. Gilbert*, 3 Wend. 344; *Wait v. Morris*, 6 id. 394; *Fitzgerald v. Alexander*, 19 id. 402.

The question whether the new promise is the real cause of action, and the discharged debt the consideration which supports it, or whether the new promise operates as a waiver by the bankrupt of the defence which the discharge gives him against the original demand, has occasioned much diversity of judicial opinion. The former view was held by MARCY, J., in *Depuy v. Swart* (3 Wend. 139), and is probably the one best supported by authority. But, after as before the decision in that case, the Court held that the original demand might be treated as the cause of action, and, for the purpose of the remedy, the decree in bankruptcy was regarded as a discharge of the debt *sub modo* only, and

the new promise as a waiver of the bar to the recovery of the debt created by the discharge. We are of opinion that the rule of pleading, so well settled and so long established, should be adhered to. The original debt may still be considered the cause of action for the purpose of the remedy. The objection that, as no replication is now required, the pleadings will not disclose the new promise, is equally applicable where a new promise is relied upon to avoid the defence of infancy or the Statute of Limitations, and in these cases the plaintiff may now, as before the Code, declare upon the original demand. (*Esselstyn v. Weeks*, 12 N. Y. 635.)

The offer of the plaintiff to prove an unconditional promise by the defendant, after his discharge, to pay the debt, was improperly overruled, and the judgment should, for this reason, be reversed, and a new trial ordered, with costs to abide the event.

All concur, except FOLGER, J., not voting.

Judgment reversed.

SECTION VIII.

Gratuitous Bailment.

RICHES AND BRIGGS.

IN THE QUEEN'S BENCH, EASTER TERM, 1601.

[*Reported in Yelverton, 4.*]

IN an action on the case the plaintiff declared that, in consideration he had delivered to the defendant twenty quarters of wheat, the defendant promised upon request to deliver the same wheat again to the plaintiff. And adjudged a good consideration; for by POPHAM and *tot. cur.* the very possession of the wheat might be a credit and good countenance to the defendant to be esteemed a rich farmer in the country, as in case of the delivery of 1,000*l.* in money to deliver again upon request; for by having so much money in his possession he may happen to be preferred in marriage. *Quære*, for it seems an hard judgment; for the defendant has not any manner of profit to receive, but only a bare possession. *Nota*, the truth of the case was (which doth not alter the reason *supra*) that the plaintiff had delivered to the defendant the said twenty quarters of wheat to deliver over to J. S. to whom the plaintiff was indebted in so many quarters, and the defendant promised to deliver the same quarters of wheat to J. S. And because they were not delivered, the plaintiff brought his action *ut supra*; and adjudged *ut supra*. But *nota*, the judgment was reversed in the Exchequer, Mich. 44 & 45 Eliz., as Hitcham told Yelverton.

PICKAS v. GUILLE.

IN THE KING'S BENCH, TRINITY TERM, 1608.

[Reported in *Yelverton*, 128.]

THE plaintiff declared that the defendant, in consideration the plaintiff *adtunc et ibidem* at the defendant's request *deliberavit* to the defendant four broadcloths, and two packs and a half of wool of the plaintiff's, to the value of 50*l.*, promised the same broadcloths and packs of wool to the plaintiff upon request to redeliver; the plaintiff said, *in facto*, that he did deliver them to the defendant; yet the defendant had not, although he was such a day, &c., requested, redelivered them. And on *non assumpsit* pleaded, it was found for the plaintiff. And *Yelverton* showed, in arrest of judgment, that there is no consideration laid in the declaration to draw a promise from the defendant, for the defendant had no benefit by the cloths, &c., but *nudam custod.*, which is rather a charge than a benefit; for the defendant could not use them; and, therefore, it is to be resembled to 9 E. 4, where delivery of the evidences to the true owner is no consideration, for the owner ought to have them of common right. *Quod fuit concessum per totam curiam.* And *nil capiat per billam* entered.

WHEATLEY v. LOW.

IN THE KING'S BENCH, TRINITY TERM, 1623.

[Reported in *Croke James*, 668.]

ACTION on the case. Whereas he was obliged to J. S. in forty pounds for the payment of twenty pounds; and, the bond being forfeited, he delivered ten pounds to the defendant, to the intent he should pay it to J. S. in part of payment *sine ullâ morâ*; that *in consideratione inde* the defendant assumed, &c., and assigns for breach that he had not paid; whereupon the other had sued him for this debt, &c.

The defendant pleaded *non assumpsit*; and verdict for the plaintiff.

It was moved, in arrest of judgment, that this is not any consideration, because it is not alleged that he delivered it to the defendant upon his request; and the acceptance of it to deliver to another *sine morâ* cannot be any benefit to the defendant to charge him with this promise.

Sed non allocatur; for, being that he accepted this money to deliver, and promised to deliver it, it is a good consideration to charge him

Wherefore it was adjudged for the plaintiff. A writ of error being brought, and this matter only assigned for error, the judgment was affirmed.¹

HART v. MILES.

IN THE COMMON PLEAS, APRIL 23, 1858.

[*Reported in 4 Common Bench Reports, New Series, 371.*]

THE first count of the declaration stated that, in consideration that the plaintiff would consent to the defendant's retaining possession of two bills of exchange, one for 25*l.*, and the other for 24*l.* 10*s.* 6*d.*, each drawn by the defendant upon, and accepted by the plaintiff, and payable to the defendant's order, and to which bills the plaintiff was then entitled, and of which the defendant was then the holder, but not for value, the defendant promised the plaintiff that, if he should succeed in procuring the said bills or either of them to be discounted, he would pay to Messrs. Sotheron & Richardson the proceeds of such discounting, or a sufficient part thereof, in discharge of another bill of exchange for 45*l.* 5*s.* 10*d.*, or of so much thereof as such proceeds would satisfy; and the defendant succeeded in procuring the said first-mentioned bills to be discounted, and the plaintiff did all things necessary to have the defendant perform his said promise, and a reasonable time for the defendant so to do elapsed; yet the defendant broke his said promise in this, that he did not pay the proceeds, or any part thereof, to the said Messrs. Sotheron & Richardson, in discharge of the said bill of exchange for 45*l.* 5*s.* 10*d.*, or any part thereof; by reason whereof the said Messrs. Sotheron & Richardson obtained judgment in an action at law against the plaintiff for the amount of the last-mentioned bill, and damages and costs, amounting to a large sum, to wit, 51*l.* 4*s.* 2*d.*, and issued execution thereon, and caused the plaintiff's goods to be seized and sold in satisfaction of the said judgment, and of the pound

¹ "There has been a question made, if I deliver goods to A., and in consideration thereof he promise to redeliver them, if an action will lie for not redelivering them, and in *Yelv.* 4 judgment was given that the action would lie. But that judgment was afterwards reversed, and according to that reversal there was judgment afterwards entered for the defendant in the like case. *Yelv.* 128. But those cases were grumbled at, and the reversal of that judgment in *Yelv.* 4 was said by the judges to be a bad resolution, and the contrary to that reversal was afterwards most solemnly adjudged in 2 *Cro.* 667, *Tr.* 21 *Jac.* 1, in the King's Bench, and that judgment affirmed upon a writ of error. And yet there is no benefit to the defendant, nor no consideration in that case but the having the money in his possession, and being trusted with it, and yet that was held to be a good consideration. And so a bare being trusted with another man's goods must be taken to be a sufficient consideration, if the bailee once enter upon the trust, and take the goods into his possession." *Holt, C. J., Coggs v. Bernard*, 2 *Ld. Raym.* 920.

age, costs, and expenses of the said execution, amounting in the whole to a large sum, to wit, 64*l.* 2*s.* 10*d.*, and of certain arrears of rent; and, by reason thereof, the goods of the plaintiff, to a much greater value than the amount of those moneys, were sold under the said execution for the purpose of raising the said moneys; and thereby the plaintiff was greatly injured in his expectations, and ruined in his business and circumstances, and greatly harassed and impoverished; and by reason thereof also the plaintiff became liable to pay the two first-mentioned bills, and may have to pay the same, and was put to costs and charges in and about endeavoring to procure the holder of those bills not to sue the plaintiff thereon.

The defendant pleaded, amongst other pleas, — secondly, that he did not succeed in procuring the said bills to be discounted as alleged. Issue thereon. The cause was tried before Williams, J., at the Sittings in London after last Term.

It appeared that the defendant received the two bills on the 30th of June, 1857, and paid them in to his account at his bankers', where they were entered short; but that, shortly afterwards, he obtained an advance from the bankers, upon an understanding that any bills in their hands belonging to him might be discounted. The execution took place on the 7th of August; and the bills became due in September.

On the part of the defendant, it was submitted that this was a mere naked bailment, and that the defendant was acting as agent for Messrs. Sotherton & Richardson.

The learned judge left it to the jury to say whether the defendant made the agreement upon his own responsibility, whether he did succeed in getting the bills discounted, and whether he knew of the discount before the date of the execution; telling them that if he did know of the discount before that event, there was an end of the case, except as to damages; but that if he did not, he would not be liable.

The jury returned a verdict for the plaintiff, — damages, 75*l.*

Wordsworth, Q. C., now moved for a new trial, on the grounds of misdirection, and that the verdict was against evidence; and also in arrest of judgment as to the first count. He submitted that the question of agency ought to have been more pointedly put to the jury, and that they should have been told that the defendant was not responsible for the accidental passing of the bills to his credit by his bankers without his authority. As to the arrest of judgment, he contended that the count disclosed no consideration whatever for the defendant's promise; and that, at the utmost, it disclosed a mere bailment without reward. [WILLES, J. If there be any consideration, we cannot inquire into the adequacy of it. *Haigh v. Brooks*, 10 Ad. & E. 309, 4 P. & D. 288.]

CROWDER, J. I am of opinion that there is no ground for arresting the judgment in this case. Looking at the whole declaration, though it certainly is somewhat vague, I think it may be supported, and that

the consideration stated is sufficient. The statement is that, in consideration that the plaintiff would consent to the defendant's retaining possession of two bills of exchange (describing them), to which bills the plaintiff was then entitled, and of which the defendant was then the holder, but not for value, the defendant promised, &c. It is clear that the bills were the plaintiff's property, and that he was entitled to the possession of them; and it is equally clear that they were in the possession of the defendant without value. Instead of requiring him to give them up, the plaintiff consents that the defendant shall retain them for a given purpose, viz., to get them discounted. That is a sufficient consideration for the defendant's promise to dispose of the proceeds in the manner agreed upon, if he succeeded in getting the bills discounted. If the defendant had not made the promise he did, the plaintiff might have handed the bills over to somebody else for the purpose of procuring them to be discounted. I think the consideration was sufficient to support the promise. As to the alleged misdirection, I am at a loss to discover in what it consisted. It is said that the learned judge should have told the jury that the defendant got no benefit from the transaction; and further, that he had been pressed with an argument that the case was one of agency only, — that the defendant was acting merely as agent for Sotheron & Richardson, — and that that should have been put to the jury. The learned judge did ask the jury whether the defendant made the agreement upon his own responsibility. That was in effect putting the question of agency to them. The defendant clearly did not make the promise as agent: it was an original undertaking. I see no ground therefore for granting a rule upon this point. But, with regard to the evidence, we will speak to the learned judge.

WILLES, J. I agree with my brother Crowder that there was no misdirection. As to the arrest of judgment, I also agree with him in thinking that the declaration discloses a sufficient consideration for the defendant's promise. If the pleader had reflected a little, he would probably have stated it thus: in consideration of the plaintiff's consenting to the defendant's retaining possession of the bills, and getting the same discounted if he could, the defendant promised, &c. I rather think he was considering how the promise would have looked had it been gathered from a correspondence between the parties. If the defendant had written to the plaintiff thus: "In consideration of your consenting to my retaining the bills in my possession, I undertake, if I succeed in procuring them to be discounted, to hand over the proceeds to you;" and the plaintiff had answered, "I assent to the terms of your letter;" there would have been a contract between them that the defendant should procure the bills to be discounted if he could, and hand over the proceeds. That is the contract, which is to be implied here. It is *do ut facias* or *facio ut facias*. That brings me to my last observation: if this be not a sufficient consideration, the defendant might have procured the bills to be discounted without being compell-

able to hand over the proceeds. Assuming that there was no consideration in the first instance, the fact of the defendant's getting the money in the end makes him liable; just as a man who gives a guaranty for goods to be supplied to a third person incurs no liability until the goods are supplied,—the contract being until then entirely unilateral.

BYLES, J. I am of the same opinion. The true meaning of the declaration I conceive to be this, that the plaintiff intrusts or continues to intrust the two bills, which are his property, to the defendant upon certain terms. I think, for the reasons given by my brother Willes, that was a good consideration moving from the plaintiff for the defendant's promise to hand over the proceeds if he succeeded in getting the bills discounted. And further, as my brother Crowder observes, if the defendant had not retained the bills, the plaintiff might have got them discounted elsewhere. The loss of that opportunity was a detriment to the plaintiff, which would be of itself a sufficient consideration. Further, the declaration alleges that the defendant afterwards succeeded in getting the bills discounted, but failed to pay over the proceeds. There is, therefore, a good consideration for the defendant's promise, at least in three ways.

CROWDER, J., on a subsequent day intimated that he had conferred with CRESSWELL, J., and that the Court saw no ground for disturbing the verdict upon the evidence.

Rule refused.

SECTION IX.

Mutual Promises.

STRANGBOROUGH AND WARNER.

IN THE QUEEN'S BENCH, 1588 OR 1589.

[*Reported in 4 Leonard, 3.*]

NOTE, That a promise against a promise will maintain an action upon the case, as in consideration that you do give to me 10*l.* on such a day, I promise to give you 10*l.* such a day after.

GOWER v. CAPPER.

IN THE QUEEN'S BENCH, HILARY TERM, 1597.

[Reported in Croke Elizabeth, 543.]

ASSUMPSIT. And declares, whereas the defendant was indebted unto him by bill in 20*l.*, the defendant, in consideration the plaintiff assumed unto him to deliver him the said bill, assumed to procure two sufficient sureties to be bound to the plaintiff for the payment of the said 20*l.*; and allegeth, in fact, that he delivered the said bill to the defendant; and that he, intending to deceive the plaintiff, produced two sureties to be bound that were of no value. The defendant pleads, that the plaintiff had not delivered unto him the said bill. And it was thereupon demurred. And without argument adjudged for the plaintiff; for the alleging that he had delivered the bill was but surplusage; for the consideration was the promise to deliver it; and therefore he needed not have alleged that he delivered it. But a promise against a promise is a sufficient ground for an action. And although it be alleged that he found sureties, yet when it is alleged that they are insufficient (which is allowed by the defendant's plea and demurrer) it is all one as if he never had found sureties. Wherefore it was adjudged for the plaintiff.

NICHOLS v. RAYNBRED.

HILARY TERM, 1615.

[Reported in Hobart, 88.]

NICHOLS brought an assumpsit against Raynbred, declaring that, in consideration that Nichols promised to deliver the defendant to his own use a cow, the defendant promised to deliver him fifty shillings. Adjudged for the plaintiff in both courts, that the plaintiff need not to aver the delivery of the cow, because it is promise for promise. Note, here the promises must be at one instant, for else they will be both *nuda pacta*.

HARRISON v. CAGE AND HIS WIFE.

IN THE KING'S BENCH, MICHAELMAS TERM, 1698.

[Reported in 5 Modern, 411.]

THIS is an action on the case, wherein the plaintiff declares that, in consideration the plaintiff would marry the defendant, the defendant promised to marry him, and that he had offered himself to her, but that she refused him, and had married the other defendant.

First. This action does not lie. Indeed it might be otherwise in the case of a woman; for a marriage is an advancement to a woman, but not to a man, as appears in Anne Davis's Case,¹ and in the case of a feoffment *causa matrimonii prælocuti*, which shows that there is a great difference between the two cases of a man and a woman; for it is a breach of a woman's modesty to promise a man to marry him, but it is not for a man to promise a woman to marry her.

Secondly. Here is no time laid when this marriage was to be; and it may be still.

Thirdly. The consideration is ill; it is no more than "I will be your husband if you will be my wife;" it is no more than this, "I will be your master, and you shall be my servant."

Fourthly. It is not reasonable that a young woman should be caught into a promise.

E contra. The action very well lies; and certainly marriage is as much advancement to a man as it is to a woman. And I am sorry that the counsel on the other side has so mean an opinion of a good woman as to think that she is no advancement to a man. We say that we have offered ourselves, and that she did refuse us; and though we do not mention the portion, it is well enough.

HOLT, C. J. Why should not a woman be bound by her promise as well as a man is bound by his? Either all is a *nudum pactum*, or else the one promise is as good as the other. You agree a woman shall have an action; now what is the consideration of a man's promise? Why, it is the woman's. Then why should not his promise be a good consideration for her promise, as well as her promise is a good consideration for his? There is the same parity of reason in the one case as there is in the other, and the consideration is mutual. As for the case of the *matrimonii prælocuti*, that goes upon another reason, there being a feoffment of lands and a condition annexed to it; but this here is upon a contract. In the ecclesiastical court he might have compelled a performance of this promise; but here, indeed, she has disabled herself, for she has married another. Then you might have given in evidence any lawful impediment upon this action; as that the parties were within the Levitical degrees, &c., for this makes the promise void; but

¹ 4 Rep. 16 b.

it is otherwise of a precontract.

TURTON, J. There is as much reason for the one as for the other; and Halcomb's Case in Vaughan is plain.

ROKEBY, J. If a man be scandalized by words *per quod matrimonium amisit*, a good action lies; and why not in this case?

TURTON, J. This action is grounded on mutual promises.

HOLT, C. J. The man is bound in respect of the woman's promise; if she make none, he is not bound by his promise, and then it is a *nudum pactum*; so that her promise must be good to make his signify any thing to her; and then, if her promise be good, why should not a good action lie upon it?

Judgment for the plaintiff.

HOLT v. WARD CLARENCIEUX.

IN THE KING'S BENCH, TRINITY TERM, 1732.

[Reported in 2 Strange, 937.]

THE plaintiff declared that it was mutually agreed between the plaintiff and defendant that they should marry at a future day which is past, and that, in consideration of each other's promise, each engaged to the other; notwithstanding which the defendant did not marry the plaintiff, but had married another, which she lays to her damage of 4,000*l*.

The defendant, with leave of the Court, pleaded double; viz., *non assumpsit*, and that the plaintiff, at the time of the promise, was an infant of fifteen years of age.

The plaintiff joins issue on the *non assumpsit*, and a verdict is found for her, with 2,000*l*. damages. And, as to the plea of infancy, demurred.

This cause was several times argued at the bar: 1. By Mr. *Strange* for the plaintiff, and Serjeant *Chapple* for the defendant; when the Court inclined strongly with the plaintiff, because, though the defendant would not have the same remedy against her by action for damages, yet they thought he might have some remedy, viz., by suit in the ecclesiastical court to compel a performance, the plaintiff being of the age of consent; and that would be a sufficient consideration. And therefore appointed an argument by civilians, to see what their law would determine in such a case.

Upon the arguments of the civilians, no instance could be shown wherein they had compelled the performance of a minor's contract. And they who argued for the defendant strongly insisted that, in the case of a contract *per verba de futuro* (as this was), there was no remedy, even against a person of full age, in the spiritual court; but only an admonition. And the only reason why they hold jurisdiction

in the case of a contract *per verba de præsenti* is because that is looked upon amongst them to be *ipsum matrimonium*, and they only decree the formality of a solemnization in the face of the church.

After their arguments it was spoken to a fourth time by Mr. *Reeve* and Serjeant *Eyre*. And now this Term the Chief Justice delivered the resolution of the Court.

The objection in this case is, that, the plaintiff not being bound equally with the defendant, this is *nudum pactum*, and the defendant cannot be charged in this action. Formerly it was made a doubt by my Lord Vaughan whether any action could be maintained on mutual promises to marry; but that is now a point not to be disputed. And as to the present case, we should have had no difficulty in giving judgment for the plaintiff, if we could have been satisfied by the arguments of the civilians that, as the plaintiff was of the age of consent, any remedy, though not by way of action for damages, could be had against her. But since they seem to have had no precedent in the case, we must consider it upon the foot of the common law. And upon that the single question is, whether this contract, as against the plaintiff, was absolutely void. And we are all of opinion that this contract is not void, but only voidable at the election of the infant; and as to the person of full age it absolutely binds.

The contract of an infant is considered in law as different from the contracts of all other persons. In some cases his contract shall bind him; such is the contract of an infant for necessaries, and the law allows him to make this contract as necessary for his preservation; and therefore in such case a single bill shall bind him, though a bond with a penalty shall not. 1 Lev. 87.

Where the contract may be for the benefit of the infant, or to his prejudice, the law so far protects him as to give him an opportunity to consider it when he comes of age; and it is good or voidable at his election. Cro. Car. 502; 2 Rol. 24, 427; Hob. 69; 1 Brownl. 11; 1 Sid. 41; 1 Vent. 21; 1 Mod. 25; Sir W. Jones, 164. But though the infant has this privilege, yet the party with whom he contracts has not: he is bound in all events. And as marriage is now looked upon to be an advantageous contract, and no distinction holds whether the party suing be man or woman, but the true distinction is whether it may be for the benefit of the infant, we think, that though no express case upon a marriage contract can be cited, yet it falls within the general reason of the law with regard to infants' contracts. And no dangerous consequence can follow from this determination, because our opinion protects the infant even more than if we rule the contract to be absolutely void. And as to persons of full age, it leaves them where the law leaves them, which grants them no such protection against being drawn into inconvenient contracts.

For these reasons we are all of opinion that the plaintiff ought to have her judgment upon the demurrer.

LYNN AND ANOTHER v. BRUCE.

IN THE COMMON PLEAS, JULY 1, 1794.

[Reported in 2 Henry Blackstone, 317.]

THIS was an action of assumpsit. The first count of the declaration was on a forbearance to sue on a bond given by the defendant to the plaintiffs for 200*l*. The second was as follows; "And whereas also, afterwards, &c., in consideration that the said Robert and Thomas (the plaintiffs), at the special instance and request of the said Charles (the defendant), had then and there consented and agreed to accept and receive of and from the said Charles a certain composition of fourteen shillings in the pound, and so in proportion for a lesser sum than a pound, upon a certain other sum of one hundred and five pounds five shillings and twopence, then due and owing from the said Charles to the said Robert and Thomas upon and by virtue of a certain other writing obligatory, bearing date, &c., made and executed by the said Charles to the said Robert and Thomas, whereby he became held and firmly bound to them in the sum of two hundred pounds, in full satisfaction and discharge of the said last-mentioned writing obligatory, and all moneys due thereon, he the said Charles undertook and then and there faithfully promised the said Robert and Thomas to pay them the said composition of fourteen shillings in the pound, and so in proportion for a lesser sum than a pound, upon the said last-mentioned sum of one hundred and five pounds five shillings and twopence, upon request; and the said Robert and Thomas in fact say that the said composition of fourteen shillings in the pound, and so in proportion for a lesser sum than a pound, upon the said last-mentioned sum of one hundred and five pounds five shillings and twopence, amounted to a large sum of money, to wit, the sum of seventy-three pounds thirteen shillings and sixpence, to wit, at Westminster aforesaid, whereof the said Charles afterwards, to wit, on the same day and year last aforesaid, at Westminster aforesaid, had notice; and although the said Charles hath paid to the said Robert and Thomas a certain sum of money, to wit, the sum of seventy pounds and six shillings, part of the said last-mentioned sum of seventy-three pounds thirteen shillings and sixpence, the amount of the said last-mentioned composition, yet the said Charles not regarding, &c., hath not yet paid the sum of three pounds seven shillings and sixpence, being the residue of the said sum of seventy-three pounds thirteen shillings and sixpence, the composition last aforesaid, or any part thereof," &c.

A verdict having been found for the plaintiffs on the whole declaration, a motion was made in arrest of judgment on the ground of the insufficiency of the second count; and after argument the opinion of the Court was thus delivered by

LORD C. J. EYRE. This is a motion made in arrest of judgment, on an objection to the second count of the declaration. The substance of that count is that, in consideration that the plaintiff at the defendant's request had consented and agreed to accept and receive from the defendant a composition of fourteen shillings in the pound, and so in proportion for a lesser sum than a pound, upon 105*l.* 5*s.* 2*d.* due from the defendant to the plaintiff on a bond dated the 30th March, 1792, for 200*l.*, in full satisfaction and discharge of the bond and all money due thereon, the defendant promised to pay the said composition. It is then averred that the composition amounted to 73*l.* 13*s.* 6*d.*, and that the defendant had paid the plaintiff 70*l.* 6*s.*, part thereof. The breach is, that he did not pay 3*l.* 7*s.* 6*d.*, the residue. This will be found to be a very clear case, when the nature of the objection is understood. The consideration of the promise is, as stated in this count, an agreement to accept a composition in satisfaction of a debt. If this is an agreement which is binding, and can be enforced, it is a good consideration; if it is not binding, and cannot be enforced, it is not a good consideration. It was settled in the case of *Allen v. Harris*, 1 Lord Raym. 122, upon consideration of all the cases, that upon an accord, which this is, no remedy lies; it was said that the books are so numerous that an accord ought to be executed, that it was impossible to overturn all the authorities: the expression is, "overthrow all the books." It was added that, if it had been a new point, it might have been worthy of consideration. But we think it was rightly settled upon sound principles. *Interest reipublicæ ut sit finis litium*: accord executed is satisfaction: accord executory is only substituting one cause of action in the room of another, which might go on to any extent. The cases in which the question has been raised, whether an accord executory could be enforced, and in which it has been so often determined that it could not, have been cases in which it has been pleaded in bar of the original action. But the reason given in three of the cases in 1 Rol. Abr., tit. Accord, pl. 11, 12, 13, is because the plaintiff hath not any remedy for the whole, or where part has been performed, for that which is not performed, which goes directly to the gist of this action, as it is stated in the count objected to. This is an action brought to recover damages for that part of the accord which has not been performed. But an accord must be so completely executed in all its parts before it can produce legal obligation or legal effect, that in *Peytoe's Case*, 9 Co. 79 *b*, it was holden that, where part of the accord had been executed, tender of the residue would not be sufficient to make it a bar to the action, but that there must be an acceptance in satisfaction. There are two cases in Cro. Eliz. 304, 305, to the same effect. It was argued according to the cases in Rol. Abr. that an accord executory in any part is no bar, because no remedy lies for it for the plaintiff. Perhaps it would be a better way of putting the argument, to say that no remedy lies for it

for the plaintiff, because it is no bar; but put either way, it concludes in support of the objection to the second count in this declaration, and consequently the judgment must be arrested.

Rule absolute to arrest the judgment.

SECTION X.

Consideration Void in Part.

CRIPPS v. GOLDING.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1586.

[*Reported in 1 Rolle's Abridgment, 30.*]

If a man, in consideration of a surrender and of 10*l.* paid, promises to do such a thing, although the surrender cannot be made, so that that consideration is void, yet the action is maintainable upon the other consideration.¹

BRADBURNE v. ELIZABETH BRADBURNE.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1589.

[*Reported in Croke Elizabeth, 149.*]

ASSUMPSIT. The Court held, where there are divers considerations alleged by the plaintiff, and some are frivolous and void, yet if any of them be good, the plaintiff shall recover. And it was so adjudged.

COLSTON v. CARRE.

IN THE QUEEN'S BENCH, HILARY TERM, 1600.

[*Reported in 1 Rolle's Abridgment, 30.*]

If A. promises B., in consideration that she will not sue an attachment out of chancery upon a decree which is there made against him,

¹ In 1 Leon. 296, s. c. *nom.* Crisp and Golding's Case, it was said by Coke, *arguendo*: "Where two or many considerations are put in a declaration, although some be void, yet if one be good, the action well lieth, and damages shall be taxed accordingly." — ED.

and in consideration that she will give him all her right and title of dower, that then he will pay her 20*l.*; though the second consideration is void, because it cannot be given to a stranger, but only released to the tenant of the land by way of extinguishment, yet the action upon the case lies upon the other consideration which is good.¹

CRISP v. GAMEL.

IN THE KING'S BENCH, TRINITY TERM, 1606.

[Reported in *Croke James*, 128.]

It was resolved that where, in an assumpsit, two considerations be alleged, the one good and sufficient, and the other idle and vain, if that which is good be proved, it sufficeth; and although he fails in the proof of the other, it is not material: because it was in vain to allege it; and it is as if it had not been alleged.

BEST v. JOLLY.

IN THE COMMON PLEAS, EASTER TERM, 1661.

[Reported in 1 *Siderfin*, 38.]

IN an action upon the case for the non-payment of 69*l.*, the case was as follows: The defendant was indebted to the plaintiff in 6*l.*, and the son of the defendant was indebted to the plaintiff for *diversa negotia*, amounting to 63*l.* And the defendant, in consideration that the plaintiff would forbear to sue for the debts for the space of one month, undertook and promised to pay the plaintiff the said debts; and for the non-payment he brought this action. And it was oftentimes argued at the bar, and this term it was adjudged *per totam Curiam*, that the action well lies, and the father shall be charged with this entire debt of 69*l.*; because, although the father was not liable for the debt of his son, nor was that debt reduced to certainty, yet when the father takes it upon him to pay it, he is liable, the consideration of forbearance being a

¹ "They all agreed that if two or three considerations be alleged in the declaration, and there be one of them sufficient, although the others be insufficient in matter or form, yet the one being sufficient, it is well enough; but if two considerations be alleged, and one of them is found false by the jury, the action fails." Cro. Eliz. 847, 848, s. c. 2d Resolution. — Ed.

damage to the plaintiff, although (as to part) no benefit to the defendant. . . .

Nota, that where there are two considerations, and one is good and the other is void, the damages given upon it shall be intended to be all given for the good consideration. . . . So in our case it shall be intended that the 69*l.* are given as damages for the 6*l.*; and in this respect also the plaintiff has a good cause of action, for the assumpsit being to pay 69*l.* is entire, and cannot be apportioned by the plaintiff, and therefore upon this assumpsit he cannot have an action for the 6*l.* only, as was agreed *per omnes*. And the Chief Justice said, If I will put my barley with your heap of barley, you can take the whole.

And of void consideration there is a difference between considerations which are against law, and consideration *inutilis*; for the latter will not vitiate a good consideration, but it seems that a consideration against law will vitiate a good consideration. *Quod nota*.

MARY KING, JOHN KING, AND SILVANUS KING, *Executrix and Executors of the Will of JAMES KING, deceased, v. MATTHEW URLWIN SEARS.*

IN THE EXCHEQUER, EASTER TERM, 1835.

[*Reported in 2 Crompton, Meeson, and Roscoe, 48.*]

ASSUMPSIT. The first count of the declaration stated that the defendant was the administrator of William Sears, who died August 10, 1833; that the said William Sears was indebted to the plaintiffs in the sum of 13*l.*, being rent due and in arrear for the use and occupation of certain premises of the plaintiffs, used and occupied by the said William Sears by the sufferance and permission of the plaintiffs and at his request, under and by virtue of a certain demise thereof made, and at and under the yearly rent of 26*l.* payable quarterly; that the said William Sears deposited with the plaintiffs, as collateral security for the said debt, a certain bill of exchange, dated March 12, 1833, for 16*l.* 14*s.*, drawn by said William Sears on and accepted by one Joseph Fabian, payable five months after date to the drawer's order and by him indorsed: that the said William Sears, at the time of his death, was in possession of said premises under said demise, and after his death Winifred, his widow and the mother of said defendant, was in possession thereof, and was possessed of goods and chattels of the value of 50*l.*, which were upon said premises and liable to be distrained for said rent; and the said Winifred was desirous of quitting said premises at Michaelmas then next, and of removing said goods and chattels therefrom (of all which said premises the defendant had notice); and thereupon, on the 24th of September, 1833, in considera

tion of the premises, and that the plaintiffs would permit the said Winifred to quit the said premises at Michaelmas then next, and to remove her goods and chattels therefrom, and would forbear to distrain the same for said 13*l.* rent so due as aforesaid and for the further quarter's rent to become due at said Michaelmas, the defendant promised the plaintiffs to pay them one quarter's rent immediately, and the remainder of the said rent within twelve months then next, the said bill of exchange being given up by the plaintiffs to the defendant. Averment, that the plaintiffs, confiding in said promise, did permit said Winifred as aforesaid and did forbear as aforesaid (whereof the defendant had notice) ; and although the said twelve months have long since elapsed, and the plaintiffs after the expiration thereof, to wit, on the 15th of October, 1834, requested the defendant to pay said rent, being the sum of 19*l.* 10*s.*, and tendered said bill of exchange to the defendant, which he refused to accept, yet, &c. Breach : non-payment of the sum of 19*l.* 10*s.*

General demurrer, and joinder.¹

The grounds stated for argument in the margin of the paper book were : —

First, that by the first count it appears that the bill of exchange therein mentioned was at the time of making the defendant's supposed promise over-due, and it is not averred to have been dishonored ; so that the rent of 13*l.* supposed to have been in arrear from William Sears, deceased, appears to have been satisfied thereby ; and the forbearance to distrain for that sum of 13*l.*, which forms part of the consideration stated for the defendant's promise, is therefore insufficient.

Secondly, that it does not appear on the first count that the plaintiffs had any right to distrain for the quarter's rent, which is supposed to have been becoming due to them at Michaelmas mentioned therein ; and so the forbearance to distrain for the sum of 6*l.* 10*s.* in respect thereof, which forms part of the consideration stated for the defendant's promise, is insufficient to support such promise, and renders the same of none effect.

Thirdly, that the consideration expressed in the first count, as moving the defendant to the promise therein alleged, is not stated to have been at the defendant's request, as, to give the same any effect, it ought to have been.

Fourthly, that it does not appear, nor can it be collected from the first count, whether the plaintiffs seek to recover against the defendant as administrator of his late father, or personally.

Erle, in support of the demurrer. First, the bill of exchange, as appears by the declaration, was given as a collateral security for the rent ; but the plaintiffs do not state that any steps were taken by them, on the bill becoming due, to obtain payment of it, nor do they aver any presentment, or show that it was dishonored, which it was their

¹ See *supra*, p. 225, note 1. — Ed.

duty as holders to have done; and, not having done so, it amounted to a satisfaction of the debt for which the bill was given, that is to say, the 13*l.* for rent due from William Sears. It was the duty of the plaintiffs to have shown on their declaration that they had done all the acts necessary to entitle them to recover on the bill. [LORD ABINGER, C. B. It is stated in the declaration to have been given as a collateral security. The action is not brought on the bill itself.] It is submitted that it was incumbent on them to show that the bill was duly presented; and, if they fail to do so, then they must be taken to have made the bill their own, and it operated as a satisfaction for the rent of 13*l.*, and the forbearance to distrain for that sum, which formed part of the consideration for the defendant's promise, failed. [PARKE, B. Though the bill was not duly presented, that objection might have been waived afterwards.] If the consideration fails to that extent, then the whole promise is *nudum pactum*. Another part of the consideration stated is the agreement not to distrain the goods of the widow to recover the sum of 6*l.* 10*s.* for rent to become due the Michaelmas following; but, as the rent was not then due, the plaintiffs could have no right to distrain for it, and consequently that was no consideration whatever. [LORD ABINGER, C. B. Was it not a privilege granted to her to be allowed to give up the tenancy at Michaelmas?] The executors could not compel her to remain, as she was a stranger to them. The allegation is that, in consideration that the plaintiff would permit the widow to quit the demised premises at Michaelmas then next, and to remove her goods and chattels from the premises, and would forbear to distrain for the said rent so due and in arrear, and for the sum of 6*l.* 10*s.* to become due at Michaelmas then next, the defendant undertook to pay the 6*l.* 10*s.* immediately, and the remainder within twelve months, the bill of exchange being given up by the plaintiffs to the defendant; but the rent of 6*l.* 10*s.* was not due, and they had no right to distrain for that sum, and therefore there is a failure of consideration. [PARKE, B. The giving up the note is one consideration, and the forbearance to distrain the goods of the widow on the premises for the rent then due from the intestate is another consideration.] At all events the whole of the consideration stated for the defendant's promise is not shown, and therefore the promise is not supported. [PARKE, B. If a sufficient consideration remains, it is enough to support the promise laid in the declaration. There is abundant consideration.] Then the consideration alleged as moving the defendant to make the promise is not stated to have been at the request of the defendant. [PARKE, B. That would only be material in the case of an executed consideration. An averment of request is only necessary in cases of executed consideration.] *Judgment for the plaintiffs.*

SECTION XI.

Executed Consideration.

HUNT v. BATE.

EASTER TERM, 1568.

[*Reported in Dyer, 272.*]

THE servant of a man was arrested, and imprisoned in the Compter in London for trespass; and he was let to mainprize by the manucaption of two citizens of London (who were well acquainted with the master), in consideration that the business of the master should not go undone. And afterwards, before judgment and condemnation, the master upon the said friendly consideration promised and undertook to one of the mainpernors to save him harmless against the party plaintiff from all damages and costs, if any should be adjudged, as happened afterwards in reality; whereupon the surety was compelled to pay the condemnation, *sc.* 31*l.*, &c. And thereupon he brought an action on the case, and the undertaking was traversed by the master, and found in London at *nisi prius* against him. And now in arrest of judgment it was moved that the action does not lie. And by the opinion of the Court it does not lie in this matter, because there is no consideration wherefore the defendant should be charged for the debt of his servant, unless the master had first promised to discharge the plaintiff before the enlargement and mainprize made of his servant, for the master did never make request to the plaintiff for his servant to do so much, but he did it of his own head. Wherefore, &c.

But in another like action on the case, brought upon a promise of 20*l.* made to the plaintiff by the defendant, in consideration that the plaintiff, at the special instance of the said defendant, had taken to wife the cousin of the defendant, that was good cause, although the marriage was executed and past before the undertaking and promise, because the marriage ensued the request of the defendant. And land may be also given in frank-marriage with the cousin of the donor as well after the marriage as before, because the marriage may be intended the cause, &c. And therefore the opinion of the Court in this case this Term was, that the plaintiff should recover upon the verdict, &c. And so note the diversity between the aforesaid cases.

SIDENHAM AND WORLINGTON.

IN THE COMMON PLEAS, EASTER TERM, 1585.

[Reported in 2 Leonard, 224.]

IN an action upon the case upon a promise, the plaintiff declared that he, at the request of the defendant, was surety and bail for J. S., who was arrested in the King's Bench upon an action of 30*l.*, and that afterwards, for the default of J. S., he was constrained to pay the 30*l.*; after which the defendant, meeting with the plaintiff, promised him for the same consideration that he would repay that 30*l.*, which he did not pay; upon which the plaintiff brought the action. The defendant pleaded *non assumpsit*, upon which issue was joined, which was found for the plaintiff. *Walmesley*, Serjt., for the defendant, moved the Court that this consideration will not maintain the action, because the consideration and promise did not concur and go together; for the consideration was long before executed, so as now it cannot be intended that the promise was for the same consideration: as if one giveth me a horse, and a month after I promise him 10*l.* for the said horse, he shall never have debt for the 10*l.*, nor assumpsit upon that promise; for there it is neither contract nor consideration, because the same is executed. *ANDERSON*. This action will not lie; for it is but a bare agreement and *nudum pactum*, because the contract was determined, and not *in esse* at the time of the promise; but he said it is otherwise upon a consideration of marriage of one of his cousins, for marriage is always a present consideration. *WINDHAM* agreed with *ANDERSON*, and he put the case in 3 H. 7. If one selleth a horse unto another, and at another day he will warrant him to be sound of limb and member, it is a void warrant, for that such warranty ought to have been made or given at such time as the horse was sold. *PERIAM*, J., conceived that the action did well lie; and he said that this case is not like unto the cases which have been put of the other side: for there is a great difference betwixt contracts and this case; for in contracts upon sale, the consideration and the promise and the sale ought to meet together; for a contract is derived from *con* and *trahere*, which is a drawing together, so as in contracts every thing which is requisite ought to concur and meet together, viz., the consideration of the one side, and the sale or the promise on the other side. But to maintain an action upon an assumpsit, the same is not requisite, for it is sufficient if there be a moving cause or consideration precedent; for which cause or consideration the promise was made; and such is the common practice at this day. For in an action upon the case upon a promise, the declaration is laid that the defendant, for and in consideration of 20*l.* to him paid (*postea scil.*), that is to say, at a day after *super se assumpsit*, and that is good; and yet there the consideration is laid to

be executed. And he said that the case in Dyer, 10 Eliz. 272, would prove the case. For there the case was, that the apprentice of one Hunt was arrested when his master Hunt was in the country, and one Baker, one of the neighbors of Hunt, to keep the said apprentice out of prison, became his bail, and paid the debt. Afterwards Hunt, the master, returning out of the country, thanked Baker for his neighborly kindness to his apprentice, and promised him that he would repay him the sum which he had paid for his servant and apprentice: and afterwards, upon that promise, Baker brought an action upon the case against Hunt, and it was adjudged in that case that the action would not lie, because the consideration was precedent to the promise, because it was executed and determined long before. But in that case it was holden by all the justices that if Hunt had requested Baker to have been surety or bail, and afterwards Hunt had made the promise for the same consideration, the same had been good, for that the consideration did precede, and was at the instance and request of the defendant. RHODES, J., agreed with PERIAM; and he said that if one serve me for a year, and hath nothing for his service, and afterwards, at the end of the year, I promise him 20*l.* for his good and faithful service ended, he may have and maintain an action upon the case upon the same promise, for it is made upon a good consideration; but if a servant hath wages given him, and his master *ex abundantia* doth promise him 10*l.* more after his service ended, he shall not maintain an action for that 10*l.* upon the said promise; for there is not any new cause or consideration preceding the promise; which difference was agreed by all the justices; and afterwards, upon good and long advice, and consideration had of the principal case, judgment was given for the plaintiff; and they much relied upon the case of Hunt and Baker, 10 Eliz., Dyer, 272.

PEARLE AND EDWARDS.

IN THE QUEEN'S BENCH, EASTER TERM, 1588.

[Reported in 1 *Leonard*, 102.]

THE case was, that the defendant had leased lands to the plaintiff rendering rent for certain years; and after some years of the term expired the lessor, in consideration that the lessee had occupied the land, and had paid his rent, promised the plaintiff to save him harmless against all persons, for the occupation of the land past and also to come. And afterwards H. distrained the cattle of the plaintiff being upon the lands, upon which he brought his action. *Golding*. Here is not a sufficient consideration, for the payment of the rent is not any consideration, for the lessee hath the occupation of the land for it, and hath the profits thereof; and also the consideration is past. *Cook*.

The occupation, which is the consideration, continues ; therefore it is a good assumpsit ; as 4 E. 3, a gift in frank-marriage after the espousals, and yet the marriage is past, but the blood continues, so here ; and here the payment of the rent is executory every year ; and if the lessee be saved for his occupation, he will pay his rent the better. *Godfrey*. If a man marrieth my daughter against my will, and afterwards in consideration of that marriage I promise him one hundred pounds, the same is no good consideration ; which *CLENCH, J.*, denied. And afterwards the plaintiff had judgment to recover his damages.

MARSH AND RAINSFORD.

IN THE QUEEN'S BENCH, TRINITY TERM, 1588.

[*Reported in 2 Leonard, 111.*]

IN an action upon the case, the case was, that a communication was had betwixt the parties, that the plaintiff should marry the daughter of the defendant, in consideration of which the defendant promised the plaintiff to give him 200*l.*, but they could not agree upon the days of payment of it ; after which he stole away the defendant's daughter, and secretly married her without the defendant's knowledge ; yet afterwards the defendant gave his consent to it, and allowed of the said marriage ; and in consideration of the said marriage promised to pay the plaintiff 100*l.* *Egerton*, Solicitor-General, for the defendant : That the action upon this matter will not lie ; for here the consideration is precedent to the promise, whereas the consideration in such cases ought to be future and subsequent ; and as the case is here, the plaintiff is out of the course of consideration of marriage ; for he hath stolen away and married his wife, without the knowledge or consent of her father. See such case, 10 Eliz., *Dyer*, 272. The servant of one A. is arrested in London, and two friends of his master bail him, and afterwards A. promiseth to them, for their friendship, to save them harmless from damages and costs, &c. It was holden that the action doth not lie, for here is not any consideration, for the bailment was of their own heads, and it is executed before the promise ; but if the master before the enlargement of his servant had requested the plaintiff for to bail his servant, and he had so done, the action would have lien. *WRAY, J.* Although the consideration be precedent, yet if it were made at the instance of the other party, the action would have lien. But here the natural affection of the father to his daughter is sufficient matter of consideration. If one cometh to a serjeant at law to have his counsel, and the serjeant doth advise him, and afterwards the client, in consideration of such counsel, promiseth to pay him 20*l.*, an action lieth for

it. And so POPHAM said it had been adjudged in the Exchequer; and it is a common action in this court, in consideration *quod querens deliberasset* to the defendant, &c., he promiseth to pay him so much; and as it was late adjudged betwixt Style and Smith:¹ If a physician who is my friend, hearing that my son is sick, goeth to him in my absence, and helps and recovers him, and I being informed thereof promise him in consideration, &c., *ut supra*, to give to him 20*l.*, an action will lie for the money. And afterwards in the principal case judgment was given for the plaintiff.

JEREMY v. GOOCHMAN.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1595.

[Reported in *Croke Elizabeth*, 442.]

ASSUMPSIT. And declares that, in consideration *quod deliberasset et dedisset* to the defendant twenty sheep, he assumed to pay unto him five pounds at the time of his marriage; and allegeth *in facto* that he was married, &c. The issue was *non assumpsit*, and found for the plaintiff; and now moved in arrest of judgment, because it is for a consideration past; for it is in the preter tense *deliberasset*, and therefore no cause of action. And of that opinion was the whole court; wherefore judgment was stayed.

BARKER v. HALIFAX.

IN THE COMMON PLEAS, HILARY TERM, 1600.

[Reported in *Croke Elizabeth*, 741.]

ASSUMPSIT. Whereas the defendant, such a day and year, in consideration that the plaintiff, by the defendant's appointment and for his debt, *paulo ante tunc solvisset* to R. S. 60*l.*, that the defendant assumed to repay it upon request, &c. The defendant pleaded *non assumpsit*; and it was found against him. And after verdict, upon a motion in arrest of judgment, the judgment was stayed; because the payment of the 60*l.* being a consideration past was not sufficient to maintain the action. But WALMSLEY said that an assumpsit, in consideration that you had married my daughter, to give unto you 40*l.* was good; for the affection and consideration always continues.

¹ See note (a) to *Wennall v. Adney*, 3 B. & P. 247, 252; *Veitch v. Russell*, 3 Q. B. 928, 934. — ED.

RIGGS v. BULLINGHAM.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1599.

[Reported in *Croke Elizabeth*, 715.]

ASSUMPSIT. Whereas he was seised in fee of the advowson of Beckingham, in the county of Lincoln; in consideration that he at the defendant's request, by his deed, *dedisset et concessisset* to the defendant the first and next avoidance of the said church, the defendant, 22 August, 37 Eliz., assumed to pay to the plaintiff 100*l.*, &c. Upon *non assumpsit* pleaded, it was found for the plaintiff, and damages assessed to an 100*l.* And after verdict it was moved in arrest of judgment that this consideration is past, and therefore not sufficient to ground an assumpsit; for there is not any time of the grant alleged; and it might have been divers years before the assumpsit made; and being a thing executed and past, no assumpsit afterwards can be good: and in proof thereof Dyer, 272, Hunt v. Bate was cited. But all the Court resolved to the contrary; for the grant being made at his request, it is a sufficient consideration, although it were divers years before; especially being to the defendant himself, the consideration shall be taken to continue. But if the grant had been to a stranger, and not at the defendant's request, it had peradventure been otherwise. . . . Wherefore it was adjudged for the plaintiff.

DOCKET v. VOYEL.

IN THE COMMON PLEAS, EASTER TERM, 1602.

[Reported in *Croke Elizabeth*, 885.]

ASSUMPSIT. Whereas the defendant, 10th May, 40 Eliz., in consideration that the plaintiff at a certain day then past, at the defendant's request, had lent unto him 30*l.* for such a time; that the defendant assumed to lend unto the plaintiff upon request 30*l.* for a year, or otherwise to give him 40*s.* The plaintiff allegeth that the defendant did not lend him 30*l.* *licet requisitus*, &c., nor pay the said 40*s.* And it was thereupon demurred; because the consideration was past and executed, and the consideration and promise ought to go together; or else it ought to be a consideration continuing. Wherefore for this cause it was adjudged for the defendant.

BOSDEN v. SIR JOHN THINNE.

IN THE KING'S BENCH, MICHAELMAS TERM, 1603.

[Reported in *Yelverton*, 40.]

THE plaintiff declared, *quod cum ad specialem instantiam* of the defendant, he had procured credit for one Flud for two pipes of wine amounting to 51*l.*, and Flud, *super credentiam* and *per medium* of the plaintiff at the request of the defendant, *emisset* of one Roberts two pipes of wine for 51*l.*, and *superinde* the plaintiff with Flud entered into bond of 100*l.* to Roberts for payment of the said 51*l.* at a day to come, which was not paid at the day; and thereupon Roberts sued the plaintiff upon the bond, and recovered, and had a *capias* against him, whereby he *fuit coactus* to pay Roberts 67*l.*, *de solutione* of which 67*l.* *causa præallegata* he notified to the defendant, who *in consideratione præmissorum* promised to pay the plaintiff the 67*l.* at Michaelmas; and showed the failure of payment of the 67*l.* at the day, &c. And upon *non assumpsit* pleaded, it was found against the defendant. And *Yelverton* moved in arrest of judgment, that the action upon the matter shown does not lie, because the consideration was past and executed before the promise, and the defendant had no profit by it, but all the benefit was to Flud, a stranger; like the case 10 Eliz., Dy. 272, where J. S. was bail for the servant upon an arrest, and signified all to the master after the bail entered into, who promised to save him harmless; and although the bail was condemned, yet no *assumpsit* lay against the master, because the consideration was past before the promise: and it seems that upon the first request only to give credit to Flud for two pipes of wine, no *assumpsit* lies; for a bare request does not imply any promise; as if I say to a merchant, I pray trust J. S. with 100*l.*, and he does so, this is of his own head, and he shall not charge me, unless I say I will see you paid or the like. And it seems likewise that the promise shall not have relation to the first request of giving credit to Flud, because the entreaty for the credit was but for two pipes of wine amounting to 51*l.*, and the promise is for 67*l.*, and so they differ in the sums; as if I request J. S. to enter into bond for J. D. for 10*l.*, and I will see him paid; now if J. S. enters into bond of 20*l.* for the payment of 10*l.* for J. D., which 20*l.* is recovered against him, he shall not charge me on my promise but 10*l.* But *non allocatur per* FENNER, GAWDY, and POPHAM; for although upon the first request only *assumpsit* does not lie, yet the promise coming after shall have reference to the first request; and although the request was but for two pipes of wine amounting to 51*l.*, that Flud might have credit for that; yet when Roberts, who sold the wine, would not take (as appears) security but by bond of 100*l.* for payment of 51*l.*, and all this matter is signified afterwards to the defendant, who agrees to it, and promises to pay the 67*l.*, this shall charge

him; because it has its essence and commencement from the first request made by the defendant. As (*per* GAWDY) if I request one to marry my cousin, who does so, and afterwards tells me of it, and thereupon I promise him 100*l.*, this is a good promise to charge me, although the marriage was past, which is the consideration; because now the promise shall have reference to the request, which was before the marriage. *Vide* this case, Dy. 272 *b.* The same law (by him) if I entreat one to be bail for my servant, and he thereupon becomes bail, and is condemned, and afterwards tells me of it, and I promise him to save him harmless, it is good, and he shall recover his damage *in toto*. Wherefore judgment was given for the plaintiff. But YELVERTON, J., was *contra* clearly.

FIELD v. DALE.

IN THE EXCHEQUER CHAMBER, MICHAELMAS TERM, 1614.

[Reported in 1 Rolle's Abridgment, 11, placitum 8.]

IF A., in consideration that B. *barganizasset et vendidisset* to him certain tuns of strong beer at the request of A., assumed and promised to B. to pay him 4*l.* for each tun *super deliberatione inde* of 30 tuns of strong beer, this is a good consideration, although passed, because the sale was at the request of him who made the promise.

LAMPLEIGH v. BRATHWAIT.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1615.

[Reported in Hobart, 105, 1 Smith's Leading Cases, 67.]

ANTHONY LAMPLEIGH brought an assumpsit against Thomas Brathwait, and declared that, whereas the defendant had feloniously slain one Patrick Mahume, the defendant, after said felony done, instantly required the plaintiff to labor and do his endeavor to obtain his pardon from the king; whereupon the plaintiff upon the same request did, by all the means he could and many days' labor, do his endeavor to obtain the king's pardon for the said felony; viz., in riding and journeying at his own charges from London to Roiston, when the king was there, and to London back, and so to and from Newmarket, to obtain pardon for the defendant for the said felony. Afterward *scil.*, &c., in considera-

tion of the premises, the said defendant did promise the said plaintiff to give him 100*l.*¹, and that he had not, &c. ; to his damage 120*l.*

To this the defendant pleaded *non assumpsit*, and found for the plaintiff, damage 100*l.* It was said in arrest of judgment that the consideration was passed.

But the chief objection was, that it doth not appear that he did any thing towards the obtaining of the pardon but riding up and down, and nothing done when he came there. And of this opinion was my brother WARBURTON; but myself and the other two judges were of opinion for the plaintiff, and so he had judgment.

First, it was agreed that a mere voluntary courtesy will not have a consideration to uphold an *assumpsit*. But if that courtesy were moved by a suit or request of the party that gives the *assumpsit*, it will bind; for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit, which is the difference. Pasch. 10 Eliz., Dyer, 272, Hunt & Bates. See Onely's Case, 19 Eliz., Dyer, 355.

Then, to the main point, it is first clear that in this case, upon the issue *non assumpsit*, all these points were to be proved by the plaintiff:

1. That the defendant had committed the felony, *prout*, &c.
2. Then that he requested the plaintiff's endeavor, *prout*, &c.
3. That thereupon the plaintiff made his proof, *prout*, &c.
4. That thereupon the defendant made his promise, *prout*, &c.

For wheresoever I build my promise upon a thing done at my request, the execution of the act must pursue the request, for it is like a case of commission for this purpose.

So then the issue found *ut supra* is a proof that he did his endeavor according to the request, for else the issue could not have been found: for that is the difference between a promise upon a consideration executed and executory, that in the executed you cannot traverse the consideration by itself, because it is passed and incorporated and coupled with the promise.² And if it were not indeed then acted, it is *nudum pactum*.

But if it be executory, as in consideration that you shall serve me a

¹ "In *Lampleigh v. Brathwait*, it was assumed that the journeys which the plaintiff performed at the request of the defendant, and the other services he rendered, would have been sufficient to make any promise binding if it had been connected therewith in one contract; the peculiarity of the decision lies in connecting a subsequent promise with a prior consideration after it had been executed. Probably at the present day, such service on such request would have raised a promise by implication to pay what it was worth; and the subsequent promise of a sum certain would have been evidence for the jury to fix the amount."—Erle, C. J., *Kennedy v. Broun*, 13 C. B. N. S. 677, 740.—ED.

² *Harris v. Ewer*, 1 Rol. Rep. 401. Harris brought an action on the case against Ewer, and the plaintiff counted that for such a consideration (which was not executory, but executed) the defendant promised, &c. The defendant traversed the consideration, upon which it was demurred. *G. Croke*. It seems that he cannot traverse a consideration executed, *quod fuit concessum per Curiam*; and judgment was given for the plaintiff, no one appearing for the defendant.—ED.

year I will give you 10*l.*, here you cannot bring your action till the service performed. But if it were a promise on either side executory, it needs not to aver performance; for it is the counter-promise, and not the performance, that makes the consideration; yet it is a promise before, though not binding, and in the action you shall lay the promise as it was, and make special averment of the service done after.

Now if the service were not done, and yet the promise made, *prout*, &c., the defendant must not traverse the promise, but he must traverse the performance of the service, because they are distinct in fact, though they must concur to the bearing of the action.

Then also note here, that it was neither required nor promised to obtain the pardon, but to do his endeavor to obtain it: the one was his end, and the other his office.

Now then he hath laid expressly in general that he did his endeavor to obtain it, viz., *in equitando*, &c., to obtain. Now then, clearly the substance of this plea is general, for that answers directly the request; the special assigned is but to inform the Court; and therefore clearly, if upon the trial he could have proved no riding, nor journeying, yet any other effectual endeavor according to the request would have served; and therefore if the consideration had been that he should endeavor in the future, so that he must have laid his endeavor expressly, and had done it as he doth here, and the defendant had not denied the promise, but the endeavor, he must have traversed the endeavor in the general, not the riding, &c., in the special: which proves clearly that is not the substance, and that the other endeavor would serve. This makes it clear that, though particulars ought to be set forth to the Court, and those sufficient, which were not done, which might be cause of demurrer, yet being but matter of form, and the substance in the general, which is here in the issue and verdict, it were cured by the verdict. But the special is also well enough; for all is laid down for the obtaining of the pardon which is within the request; and therefore suppose he had ridden to that purpose, and Brathwait had died, or himself, before he could do any thing else, or that another had obtained the pardon before, or the like, yet the promise had holden.

And observe that case 22 E. 4, 40, condition of an obligation to show a sufficient discharge of an annuity, you must plead the certainty of the discharge to the court. The reason whereof given by Brian and Choke is, that the plea there contains two parts, one a trial *per pais*, *scil.* the writing of the discharge, the other by the Court, *scil.* the sufficiency and validity of it, which the jury could not try, for they agree that if the condition had been to build a house agreeable to the state of the obligee, because it was a case all proper for the country to try, it might have been pleaded generally; and then it was a demurrer, not an issue as is here.

JANSON v. COLOMORE.

IN THE KING'S BENCH, TRINITY TERM, 1616.

[Reported in 1 Rolle's Reports, 396.]

JANSON brought an action upon the case against Colomore, and counted that, whereas the defendant was indebted to him, upon an accounting he was found in arrears to such an amount, and *in consideratione inde* the defendant *tunc et ibidem* promised to pay the said money at a certain day then to come, and for non-payment the action is brought. After a verdict for the plaintiff, it was moved in arrest of judgment that this action upon the case does not lie; for it is only in effect that a man who is indebted to me assumes to pay the debt at a day to come, in which it is clear that an action on the case does not lie, because the contract was before the promise and executed, and this promise to pay at a day to come cannot make it a contract executory.

HOUGHTON. It seems that this action lies in this case, because it is that, upon his being found in arrears, the defendant *tunc et ibidem* assumpsit; so that, at the instant of the finding of the arrears, then commenced the duty in certain, and therefore the assumpsit at the same time is good; *quod fuit concessum per* CROKE and DODERIDGE; and DODERIDGE said that Slade's Case is that every debt executory includes an assumpsit. . . .

HODGE v. VAVISOR.

IN THE KING'S BENCH, MICHAELMAS TERM, 1616.

[Reported in 1 Rolle's Reports, 413.]

HODGE brought an action upon the case against Vavisor, and declared *quod cum* the defendant was indebted to him on such a day, &c., in a certain sum for divers things in certain sold to him, and being *sic indebitatus, postea*, on a day afterwards, *in consideratione inde* promised to pay it at a day certain afterwards, and for non-payment at the day he brought the action; and after verdict for the plaintiff, *J. Harris* moved in arrest of judgment that the declaration is not good, because this assumpsit does not commence with the debt, but is made at a day after, for which there is no consideration; for here is no promise by the plaintiff that he will forbear the defendant until the day of payment, and so no consideration, for he could sue him the next day after; so if a man promise another, in consideration that he has built a house for him, to give him 20*l.*, this is not good, because the consideration is past; but it is

otherwise in the case of marriage, because that consideration continues; and he showed a precedent where an exchange was made by a goldsmith for a certain sum, and afterwards such assumpsit was made as here, and adjudged no good cause of action because the consideration was past.

HOUGHTON. That is not like our case, because that is fully executed, it being an exchange; but *tota Curia, scil.*, CROKE, DODERIDGE and HOUGHTON: It seems that the action well lies, because the continuance of the debt to the time of the promise made is a good consideration continuing until the promise made to support this action; and DODERIDGE said the promise of payment included a forbearance until the day; and HOUGHTON said it was a usual declaration *quod cum indebitatus fuit* such a day, *postea eodem die assumpsit*, &c., and it is good, which seems to be all one with our case. *Harris*. “Ceo fuit un question en temps Popham pur ceo que peradventure cest promise puissoit estre al auter temps, scilicet en le Sommer, et le dett en le Matin del’ jour, mes al darren fuit adjudge bon.” HOUGHTON. That is all one with our case; and judgment was accordingly given for the plaintiff. (R. *quære* of this case; for it seems that here is no consideration for a new promise, inasmuch as no forbearance is promised; for it has been held that a consideration to forbear *per paululum temporis* is not good, because he can sue him notwithstanding; so in our case. And in this case it does not lie as upon a future contract, because the contract was executed before, and it does not make a new contract.)

HOWLET'S CASE.

IN THE KING'S BENCH, TRINITY TERM, 1626.

[*Reported in Latch*, 150.]

THE plaintiff declared that such a day, *anno* 21 Jac., he sold to the defendant so much barley, part of which he delivered immediately, and by agreement was to deliver the remainder afterwards; and afterwards on the same day the defendant promised to pay so much by such a day.

Hitcham, Serjt. Here the promise is made after the sale; and so, being upon a consideration executed, it is bad. But *per CURIAM*: It is well enough, being on the same day, since no division shall be made in this case.

TOWNSEND v. HUNT.

IN THE KING'S BENCH, TRINITY TERM, 1635.

[Reported in *Croke Charles*, 408.]

ASSUMPSIT. The plaintiff declares, whereas Francis Townsend made his will, and thereby devised to the plaintiff 60*l.* to be paid at his age of one-and-twenty years; and made Anne his wife his executrix, and left assets to pay his debts and legacies; and that the said Anne took the defendant to husband, and afterwards the plaintiff came to full age; and the defendant and his wife paid to the plaintiff, in part payment of the said legacy, upon the 23d of April 53*l.*, who gave to the defendant and his wife a general release; that the defendant, 28 September, 5 Car. 1, in consideration that the plaintiff at the defendant's request had made a general release to the defendant and his wife, assumed to the plaintiff that, if his wife did not pay the seven pounds' residue of the said legacy in her lifetime, that he would pay it after his wife's death; and alleges in fact that the defendant's wife did not pay the said seven pounds in her life, and that he had required it of the defendant, and he had not paid it; *per quod actio accrevit*.

Upon this declaration the defendant demurred; and it was argued at the bar by *Farrer* for the plaintiff, and by *Calthrop* for the defendant. And he shewed for cause of his demurrer that this promise, being for a consideration past, is a void promise; and here is not a continuing consideration, but *nudum pactum unde non oritur actio*; and compared it to the case in 10 Eliz., Dyer, 272, where one promised to one who was bail for his servant to save him harmless, and it was adjudged a void promise.

BERKLEY, J., for this reason was of that opinion; but if it had been a consideration continuing, as in consideration of marrying his daughter or cousin, which is a gift in frank-marriage, it had been good; but not here, no more than if in consideration you gave him an horse a year since he had promised to pay you ten pounds, which is void because past.

But Justice JONES and myself, upon the first motion, conceived it good; for if this promise had been made at the time of the release made, it had been clearly a good promise and a good consideration; then being made after the release, forasmuch as the release is made at the defendant's request, and the defendant hath the continuance of the benefit thereof, the promise upon this consideration is good enough: for so the case imports in Dyer, 272. If the bail had been entered into at the master's request, and afterwards he had made the promise, it had been well enough. And for this purpose they vouched the case of *Marsh v. Rainsford*, and another case here of *Riggs v.*

Bullingham, where, in consideration that the plaintiff at the defendant's request had granted the next avoidance of such a church, the defendant at a day after promised to pay the plaintiff one hundred pounds. After verdict upon *non assumpsit*, it was moved in arrest of judgment, first, because there was no time or place mentioned when that grant was made. *Sed non allocatur*; because it was but an inducement to the action. A second exception; because it was a consideration past, and it might be twenty years before. *Sed non allocatur*; because it was made at the defendant's request.

Afterwards in Michaelmas Term, 11 Car. 1, the principal case being moved again, all the JUSTICES, *seriatim*, delivered their opinions that it was good; and it was adjudged for the plaintiff.

BARTON v. SHURLEY.

IN THE KING'S BENCH, MICHAELMAS TERM, 1639.

[Reported in 1 Rolle's Abridgment, 12, placitum 16.]

If the defendant, on the 30th of June, was indebted to the plaintiff in 20*l.* for money lent by the plaintiff to him, and the defendant being so indebted afterwards, viz., on the 30th of July thereafter, promised to pay him at a day to come, this is good, for it is a continuing consideration.

OLIVERSON v. WOOD.

IN THE COMMON PLEAS, TRINITY TERM, 1693.

[Reported in 3 Levinz, 386.]

ASSUMPSIT. And declares that whereas the defendant was indebted to the plaintiff in 20*l.* for wares sold, *cumque etiam* in consideration that the plaintiff had sold other goods to the defendant, he promised to pay; *cumque etiam* the defendant was indebted to the plaintiff in another 20*l.* for moneys by the plaintiff lent to the use of the defendant (but says not at his request), the defendant promised to pay it. After verdict for the plaintiff on *non assumpsit* and entire damages, it was moved in arrest of judgment, and the judgment stayed for this cause only, that the moneys in the last promise were not said lent at the defendant's request; for it may be lent to his use, contrary to his desire. Dy. 272, Hunt's Case; where the master promised, in consideration that the plaintiff had bailed his servant, to save him harmless, which being laid without request was

ill; but the case there put, of a promise upon the marriage of his daughter, was admitted to be good, because for the apparent benefit of the father, it continuing. Also they agreed a case between Tiere and Langly, lately adjudged in this court; where the consideration was, that the plaintiff in an action had prosecuted a suit for the defendant, without saying at his request, and resolved good after two or three motions in arrest, &c., after a verdict, because it is necessarily to be so intended after a verdict; for otherwise it would be maintenance. *Levinz* for the plaintiff.

HAYES v. WARREN.

IN THE KING'S BENCH, EASTER TERM, 1732.

[Reported in 2 *Strange*, 933.]

ERROR of a judgment in C. B., in an action upon the case upon several promises; and after judgment by default and entire damages, it was objected that the fourth count was for work and labor done by the plaintiff for the defendant, in consideration whereof he promised to pay. And it was objected that this was a past consideration; and not being laid to be done at the request of the defendant, it could be no consideration to raise an assumpsit; and 1 Rol. Abr. 11, pl. 1; Cro. El. 442, 741; 3 Leon. 91; Dyer, 272, were cited by *Hussey*.

Strange, contra, cited 2 Leon. 111, 225; Raym. 260; Hutt. 84, where assumpsits have been maintained on a past consideration; and though formerly courts were strict, yet now they draw nearer to common sense. There was a time when assumpsit *pro bonis et mercimoniis* generally would have been wondered at; and Holt used to say he was a bold man that first ventured on them; but now they are every day's experience: and why should not gratitude be a good consideration? He further insisted that this is not to be taken as a past consideration, because the work and promise are both laid on the same day, and the law makes no fractions of a day, and cited *Latch*, 150, in point. He further insisted that upon the whole it appeared to be at the request of the defendant, it being laid to be done for him, and that the plaintiff *proinde* deserved from the defendant so much, which he has not paid, *ad damnum* of the plaintiff, and cited *Latch*, 112, 274.

Sed per CURIAM: It does not appear that this work was for the benefit of the defendant, and we must take it to be a past consideration, being laid that *postea* he promised to pay. If this was after a verdict, we should think the inferences from the words *pro* and *meruit de def'* would be material; but the statutes of jeofails do not protect judgments by default against objections that are cured by a verdict at common

law, but such as are remedied after a verdict by the statutes. The judgment of C. B. was reversed.¹

HOPKINS AND WIFE v. LOGAN.

IN THE EXCHEQUER, EASTER TERM, 1839.

[*Reported in 5 Meeson & Welsby, 241.*]

ASSUMPSIT. The declaration stated that, after the intermarriage of the plaintiffs, and before the commencement of this suit, to wit, on the first day of October, 1838, at the request of the defendant, an account was stated by and between the said Richard Hopkins, for and on behalf of himself and his said wife Ellen, on the one part, and the defendant on the other part, of and concerning certain moneys amounting to a large sum of money, to wit, the sum of 1,000*l.*, by the said Ellen while she was unmarried lent and advanced to the defendant at his request, and remaining unpaid before, at, and after the time of said intermarriage; and of and concerning certain other moneys, amounting in the whole to a large sum of money, to wit, to the sum of 555*l.* 3*s.* 11*d.*, by the defendant before the stating of the said account paid to the plaintiff; and which said last-mentioned moneys the said plaintiff, Richard Hopkins, for and on behalf of himself and his said wife, at the time of the said stating of the said account, and at the request of the defendant, agreed should be taken and considered as satisfying and discharging so

¹ According to the report of this case in 2 Barnard. 71, the Chief Justice and Page, J., said: "The present action is not for goods sold and delivered; if it had been, it would have been a much more favorable case for the plaintiff; because, by the acceptance of the goods, there seems to be an agreement to pay for them. But here the defendant might be no ways privy to the work done at the time of the doing it." At p. 140, Strange is reported to have said, *arguendo*: "Wherever the consideration past concerned the benefit of a stranger only, a request is necessary to charge the defendant. But wherever the consideration is for the benefit of the defendant, no such request is necessary when there is an express promise laid in the declaration." But "the Court declared that they took the rule of law to be, that no past consideration is sufficient to support a subsequent promise, unless there was a request of the party, either express or implied, at the time of performing the consideration. Some acts," they said, "were of such a nature as that the law could imply a request; as the being bail for one, curing one's child of a sudden sickness, performing the part of a servant, &c.; and therefore in those cases they did allow that a subsequent promise might be well founded upon such past consideration. They did agree likewise, that where there was an express request at the time of the past consideration being performed, that might in all cases be sufficient to support a subsequent promise. And therefore the Chief Justice said he could not agree the case cited out of 3 Cro. 741 [*Barker v. Halifax*] to be law. But in the present case the act done by the defendant was by no means of such a nature as to be sufficient for the law to create a request upon it; and therefore an express request was necessary to have been laid." And see *W. Kelynge*, 117, s. c. — *Ed.*

much of the first-mentioned sum of money; and, upon the account so stated as aforesaid, the defendant was then found to be and then was in arrear and indebted to the plaintiff in a large sum of money, to wit, the sum of 444*l.* 16*s.* 1*d.*, residue of the said first-mentioned sum of money; and being so found in arrear and indebted as aforesaid, the defendant, in consideration of the premises, promised the plaintiffs to pay them the said last-mentioned sum of money on the tenth day of October then next ensuing, which period had elapsed before the commencement of this suit. Breach, in non-payment of the last-mentioned sum of money.¹

LORD ABINGER, C. B. I am of opinion that this declaration is bad, for that the contract declared upon is not binding on both parties, the consideration being executed upon which the new promise is attempted to be founded. The promise, it is true, proceeds both on the accounting and on the payment of the 555*l.* by the defendant; but both those considerations are executed. The liability of the defendant on the account stated would be to pay the amount on request; to render him liable on the promise here alleged to pay on a future day, there ought to be some new consideration. . . .

PARKE, B. . . . The promise as laid cannot be supported, because there is no consideration for any promise different from that which the law implies. The promise which arises in law upon an account stated is to pay on request, and any other promise is *nudum pactum*, unless made upon a new consideration. At the time of the alleged promise the party is liable to pay *in præsentì* on request; and if by a simple promise, without fresh consideration, there can be a contract for future payment, the Statute of Limitations may be defeated by a mere verbal promise. Any promise to pay money *in futuro*, which is payable *in præsentì*, is bad, unless it be on a new consideration. The plaintiff here proceeds on an executed consideration, which constitutes an existing debt; and no such new consideration appears in the present case.

ALDERSON, B. If it were necessary to give an opinion upon the plea, I should wish to take some time to consider it; but I concur with the rest of the Court in thinking that the declaration is bad. The consideration is clearly executed, and the promise which the law implies thereon is to pay on request. In order to convert that promise into a promise to pay at a future day, there must be a new consideration. Here there is none, and on that ground the declaration is bad. If it were otherwise, the consequence would follow that, as such a promise may be by word of mouth, the Statute of Limitations might always be evaded without a writing.

MAULE, B. I agree that an executed consideration is no consideration for any other promise than that which the law would imply; if it were, there would be two co-existing promises on one consideration.

¹ The defendant pleaded a special plea, which was demurred to; and the question thus arose whether the declaration was good. Only so much of the case is here given as relates to the latter question. — ED.

On this ground, without adverting to the objections raised to the plea, I think that the defendant is entitled to judgment.

Judgment for the defendant.

ROSCORLA v. THOMAS.

IN THE QUEEN'S BENCH, MAY 30, 1842.

[Reported in 3 Queen's Bench Reports, 234.]

ASSUMPSIT. The declaration stated that, whereas heretofore, to wit, &c., in consideration that plaintiff at the request of defendant had bought of defendant a certain horse, at and for a certain price, &c., to wit, &c., defendant promised plaintiff that the horse did not exceed five years old, and was sound, &c., and free from vice; nevertheless defendant did not perform or regard his said promise, but thereby deceived and defrauded plaintiff in this, to wit, that the said horse at the time of the making of the said promise was not free from vice; but, on the contrary thereof, was then very vicious, restive, ungovernable, and ferocious; whereby, &c.

Pleas. 1. *Non assumpsit.* Issue thereon.

2. That the horse, at the time of the supposed promise, was free from vice, and was not vicious, restive, ungovernable, or ferocious, in manner, &c.; conclusion to the country. Issue thereon.

On the trial, before Wightman, J., at the Cornwall Spring Assizes, 1841, a verdict was found for the plaintiff on both the above issues. In Easter Term, 1841, *Bompas*, Serjt., obtained a rule *nisi* for arresting the judgment on the first count. In last Term

Erle and *Butt* shewed cause. The objection is, that the first count states only a *nudum pactum*. But there is an executed consideration, which with a request will support a promise. Now the request need not be express; wherever the law will raise a promise, a request by the party promising will be implied; note (*c*) to *Osborne v. Rogers*.¹ *Payne v. Wilson* was the converse of the present case: there a consideration, which in its form was executed, was declared on as executory; and this was held to be no variance, because in reality the consideration was continuing. Here the declaration states an executed consideration in form; but it is practically executory because the sale and warranty would be coincident. In *Thornton v. Jenyns*² the declaration charged that, in consideration that plaintiff had promised to defendant, defendant then promised plaintiff. It was objected that this was an executed consideration without a request, which was insufficient where the law would not raise a promise; and *Brown v. Crump*³ was cited; but the

¹ 1 Wms. Saund. 264 a.

² 1 Man. & G. 166.

³ 1 Marsh. 567.

Court held that the two promises might be considered as simultaneous, and that the objection therefore could not be sustained.¹

Bompas, Serjt., and *Slade*, contra. The warranty ought to be given at the time of the sale: if made after, it is without consideration. 3 Blackst. Com. 166; Com. Dig., Action upon the Case for a Deceit (A. 11); *Roswel v. Vaughan*,² *Pope v. Lewyns*.³ *Thornton v. Jenyns* was a case of mutual promises, which can never literally be made at the same moment: here the declaration definitely lays the perfect sale as antecedent to and distinct from the warranty. And the warranty is a matter not implied by the law upon a sale. *Parkinson v. Lee*.⁴ Even an express promise without a legal consideration is invalid. *Collins v. Godefroy*.⁵ In *Hopkins v. Logan* there was an executed consideration from which a promise to pay on request would have arisen; and it was holden that this did not support a promise to pay on a future day named. [*PATTESON, J.*, referred to *Hunt v. Bate*, as cited in *Eastwood v. Kenyon*, and to *Lampleigh v. Brathwait*.] *Cur. adv. vult.*

LORD DENMAN, C. J., in this Term (May 30) delivered the judgment of the Court.

This was an action of assumpsit for breach of warranty of the soundness of a horse. The first count of the declaration, upon which alone the question arises, stated that, in consideration that the plaintiff at the request of the defendant had bought of the defendant a horse for the sum of 30*l.*, the defendant promised that it was sound and free from vice. And it was objected, in arrest of judgment, that the precedent executed consideration was insufficient to support the subsequent promise. And we are of opinion that the objection must prevail.

It may be taken as a general rule, subject to exceptions not applicable to this case, that the promise must be coëxtensive with the consideration. In the present case, the only promise that would result from the consideration as stated, and be coëxtensive with it, would be to deliver the horse upon request. The precedent sale without a warranty, though at the request of the defendant, imposes no other duty or obligation upon him. It is clear therefore that the consideration stated would not raise an implied promise by the defendant that the horse was sound or free from vice.

But the promise in the present case must be taken to be, as in fact it was, express; and the question is, whether that fact will warrant the extension of the promise beyond that which would be implied by law; and whether the consideration, though insufficient to raise an implied promise, will nevertheless support an express one. And we think that it will not.

¹ It was also argued that the warranty might here, after verdict, be taken to be coincident with the sale: to which it was answered that if it were so, the evidence negatived the declaration.

² Cro. Jac. 196.

³ Cro. Jac. 630.

⁴ 2 East, 314.

⁵ 1 B. & Ad. 950.

The cases in which it has been held that, under certain circumstances, a consideration insufficient to raise an implied promise will nevertheless support an express one, will be found collected and reviewed in the note (a) to Wennall v. Adney,¹ and in the case of Eastwood v. Kenyon. They are cases of voidable contracts subsequently ratified, of debts barred by operation of law subsequently revived, and of equitable and moral obligations which, but for some rule of law, would of themselves have been sufficient to raise an implied promise. All these cases are distinguishable from, and indeed inapplicable to, the present, which appears to us to fall within the general rule, that a consideration past and executed will support no other promise than such as would be implied by law.

The rule for arresting the judgment upon the first count must therefore be made absolute. *Rule absolute.*

KAYE v. DUTTON.

IN THE COMMON PLEAS, JUNE 29, 1844.

[Reported in 7 Manning & Granger, 807.]

ASSUMPSIT. The first count of the declaration stated that, by a certain instrument in writing made by the defendant on the 22d of September, 1836, — after reciting that one Whitnall, since deceased, had mortgaged certain freehold property to R. Rockliff and H. Bullen to secure 3,500*l.*; that said mortgagees had required the said Whitnall to obtain the plaintiff to join him in a bond as a collateral security further to secure said sum of 3,500*l.* and interest; that, since the death of said Whitnall, the defendant had taken upon himself the management of his estate, and had paid 3,370*l.* on said mortgage, and that the plaintiff had been called upon to pay and had paid the sum of 130*l.* remaining due thereon; that the defendant had repaid to the plaintiff the sum of 48*l.*, and had agreed to repay him the remaining sum of 82*l.* out of the moneys arising from the sale of said property when sold, and in the mean time to appropriate the rents of said property to the payment of said sum, as the plaintiff had a lien on said property therefor; and that the defendant had requested the plaintiff to release and convey all his estate and interest in said property to Alison and Lenox, which he had done, reserving to himself a lien on the said property as aforesaid, — it was witnessed that, in consideration of the plaintiff's having paid said sum of 130*l.*, and released and conveyed all his estate and interest in said property (reserving to himself the said lien), and in order to secure to the plaintiff the repayment of said sum of 82*l.*, the defendant under-

¹ 3 Bos. & Pul. 249.

took and agreed with the plaintiff to pay him said sum of 82*l.*, with interest thereon, out of the proceeds to arise from the sale of said property when sold, and in the mean time to appropriate the rent of said property to the payment of said sum. Averment, that the defendant, in consideration of the premises, after the making of said agreement or instrument in writing, to wit, on the said 22d of September, 1836, promised the plaintiff to observe and perform the same in all things on his part to be observed and performed; that after the making of said agreement and before said sale was effected, the defendant received rents of said property to an amount sufficient to pay said sum of 82*l.*; yet the defendant, though requested, had not appropriated said rents or any part thereof to the payment of said sum of 82*l.*, and the same is wholly due and unpaid to the plaintiff.¹

To this count the defendant pleaded amongst others two special pleas, to the replications to which he demurred specially. Upon the argument in Easter Term last, however, the defendant abandoned the pleas, and objected to the declaration.

Dowling, Serjt., for the defendant. Three objections arise on the declaration: first, it discloses no consideration for the promise alleged; secondly, the consideration (if any) is a mere moral consideration; thirdly, the consideration being executed, it can only sustain an implied promise;² whereas the promise alleged is a different one, being an express promise.

Construing the declaration most favorably for the plaintiff, it appears that he, having become surety for Whitnall, the mortgagor, paid 130*l.* to the mortgagees; that the defendant—who had taken upon himself the management of Whitnall's estate—had repaid him 48*l.*, and promised to pay him the residue out of the proceeds thereof; and that the plaintiff at the request of the defendant released and conveyed all his interest in the premises to Alison and Lenox, reserving to himself a lien on the property. This statement of facts does not disclose any consideration whatever for the defendant's promise. The only interest the plaintiff ever had in the premises was the lien which entitled him in equity to stand in the position of the mortgagees. *Copis v. Middleton*.³ The recital that the defendant had released all his estate and interest in the property except his lien, is in effect to say that he had released nothing. Possibly the consideration might have been good if it had been alleged that the plaintiff had executed some instrument purporting to convey an interest. In *Wilkinson v. Oliveira* the declaration stated that, in consideration that the plaintiff at the request of the defendant had given the defendant a letter written by O., since deceased, by means of which letter the defendant was enabled to, and did, determine controversies, and obtain a large portion of O.'s effects, the defendant promised to give the plaintiff 1000*l.*; and it was held that the declaration disclosed a sufficient consideration to sustain an

¹ See *supra*, p. 225, note 1. — Ed.

² *Quare*.

³ Turn. & Russ. 224.

action on the promise. So here, if the declaration had stated that the plaintiff had executed an assignment, it might have been sufficient; but the only consideration alleged is the assigning of his interest; whereas he had none to convey.

Secondly. The only consideration that appears upon the face of the declaration (if any) is a mere moral consideration, to which the law will give no effect. A past consideration will not support a subsequent promise. *Jeremy v. Goochman*, *Barker v. Halifax*, *Docket v. Voyel*. The law does not in truth give effect to any but an executory¹ consideration. It may be said that the consideration here is not simply an executed consideration, because it is stated that the defendant had requested the plaintiff to convey. But a mere request is of no avail. *Lampleigh v. Brathwait*. The promise alleged and the promise implied by law must be coëxtensive. *Veitch v. Russell*.² [TINDAL, C. J. That case shows that a subsequent express promise will not convert that into a debt which of itself was not a legal debt.] It establishes that an express promise cannot be supported by a moral consideration.

Thirdly. If the Court think that any promise can be implied from the facts stated, it will not be the promise alleged. It is clear that an executed consideration will only sustain such a promise as the law will imply. *Brown v. Crump*.³ . . .⁴

Channell, Serjt., contra. The declaration is good. The defendant's promise being laid to have been made in consideration of the premises, that is, of all that is stated in the foregoing part of the declaration, it is submitted that the facts alleged disclose a sufficient legal consideration. Admitting that a mere moral consideration ordinarily will not sustain a promise, here a legal consideration is apparent. If the plaintiff had any estate or interest to convey, his parting with it at the defendant's request would be an ample consideration; and upon this declaration it is not competent for the defendant to say that the plaintiff did not release some interest in the mortgaged premises. Having paid money as surety for the mortgagor, he would stand in his place, and if any interest can be inferred beyond the lien, there is a good consideration. The difficulty arises on the words "reserving to himself a lien on the said property." The fair meaning of that is, that the plaintiff had given up his lien so far as regarded Alison and Lenox, but preserved it as between himself and the defendant. As to the second point, the rule upon this subject is well laid down in 1 Wms. Saund. 264, note, where it is said that "a past consideration is not sufficient to support a subsequent promise, unless there was a request by the party, either expressed or implied, at the time of performing the

¹ *i. e.*, executory in its inception.

² 3 Q. B. 928.

³ 1 Marsh. 567, 6 Taunt. 300.

⁴ The learned counsel here cited the cases of *Granger v. Collins*, 6 M. & W. 458, *Hopkins v. Logan*, 5 M. & W. 241; *Jackson v. Cobbin*, 8 M. & W. 790; *Roscorla v. Thomas*, 3 Q. B. 234.

consideration;¹ but where there is an express request at the time, it will in all cases be sufficient to support a subsequent promise." Here, what is treated as a past consideration is stated to have been done because of the defendant's request. Cases have been cited to show that the past consideration here stated does not support the particular promise alleged in the declaration; but those cases are distinguishable, as in all of them the promise implied by law differed widely from that alleged on the face of the declaration. The question how far a moral consideration will support a subsequent express promise is discussed by Lord Denman in *Eastwood v. Kenyon*. Here, looking at the whole declaration, a sufficient consideration appears for the promise laid.

TINDAL, C. J., now delivered the judgment of the Court. This was a declaration in assumpsit upon a special agreement, to which the defendant pleaded, amongst others, two special pleas, namely, the fourth and fifth pleas, to which the plaintiff demurred; and the defendant demurred specially to the plaintiff's replication to the third plea. But it is unnecessary to advert to the particular state of the pleadings, as it was admitted by my brother Dowling, on the argument for the defendant, upon an objection taken to the fourth and fifth pleas, that he could not support those pleas, and the whole argument before us turned on the sufficiency of the declaration.

Two objections were made to the declaration: first, that it did not show any consideration for the promise by the defendant; secondly, that the promise was laid in respect of an executed consideration, but was not such a promise as would have been implied by law from that consideration; and that in point of law an executed consideration will support no promise, although express, other than that which the law itself would have implied. The cases cited by the defendant, viz.. *Brown v. Crump*, *Granger v. Collins*, *Hopkins v. Logan*, *Jackson v. Cobbin*, and *Roscorla v. Thomas*, certainly support that proposition to this extent, — that, where the consideration is one from which a promise is by law implied, there no express promise made in respect of that consideration after it has been executed, differing from that which by law would be implied, can be enforced. But those cases may have proceeded on the principle that the consideration was exhausted by the promise implied by law, from the very execution of it; and consequently any promise made afterwards must be *nudum pactum*, there remaining no consideration to support it. But the case may perhaps be different where there is a consideration from which no promise would be implied by law; that is, where the party suing has sustained a detriment to himself or conferred a benefit on the defendant at his request, under circumstances which would not raise any implied promise. In such cases it appears to have been held, in some instances, that the act done at the request of the party charged is a sufficient

¹ *Vide* 1 M. & Gr. 266, n.

consideration to render binding a promise afterwards made by him in respect of the act so done. *Hunt v. Batc*, and several cases mentioned in the margin of the report of that case, seem to go to that extent; as also do some others collected in *Rol. Abr.*, *Action sur Case (Q)*. But it is not necessary that we should pronounce any opinion upon that point;¹ for, assuming it to be sufficiently alleged that the plaintiff released and conveyed his interest at the request of the defendant, yet it does not appear that he had any interest which passed by such release and conveyance. The declaration is founded on an agreement which recites that a certain estate had been mortgaged by one Whitnall, since deceased; and that the plaintiff had joined in a bond as a collateral security for the mortgage-money, and had afterwards been compelled to pay off a portion of it; that the defendant had taken upon himself the management of Whitnall's affairs, had repaid to the plaintiff part of the money which he had paid, and had agreed to pay him the residue out of the proceeds of the mortgaged property when sold, and in the mean time to appropriate the rents of the premises to the payment of the same sum as that for which the plaintiff had a lien on the said premises. Thus far there is nothing to show that the plaintiff had any other interest than this lien. The agreement then recites that the defendant had requested the plaintiff to release and convey his interest to Alison and Lenox, and that he had done so, reserving to himself a lien on the property as aforesaid; that is, reserving to himself the only interest that he is shown to have had. The agreement then proceeds to state that, in consideration of the plaintiff having paid the money and having released and conveyed all his estate and interest to Alison and Lenox, reserving to himself the said lien, the defendant undertook and agreed, &c. Now the payment of the money by the plaintiff would be no consideration for the defendant's promise; and the alleged release and conveyance was again no consideration, for it does not appear that the plaintiff parted with any thing by it. For the plaintiff it was contended that he must be taken to have parted with his lien on the property, reserving only his right to call upon the defendant to pay the residue still due to the plaintiff out of the proceeds of the estate when sold, and in the mean time to appropriate the rents to the same object. But we cannot put that construction upon the agreement, which expressly

¹ In *Elderton v. Emmens*, 4 C. B. 496, Maule, J., said: "An executed consideration will sustain only such a promise as the law will imply. Thus, if goods are sold or work is done without any special agreement as to price, the law implies a promise to pay so much as the goods or the work may be reasonably worth. If the promise is alleged beyond that, it is not sustainable in law." To which Serjeant Manning appended the following note: "This must be understood with reference to those considerations from which, as in the case put by the learned judge, the law infers a precise promise. But A. may declare that, in consideration that he had, at the request of B., conferred a benefit on C., B. promised him, A., to pay him so much money, or to deliver to him a certain horse, a promise which would not be implied by law from such executed consideration." — *Ed.*

speaks of the lien reserved as the same lien which the plaintiff had before.

Such being in our judgment the effect of the agreement set out in the declaration, the case resembles that of *Edwards v. Baugh*. There the declaration alleged that certain disputes and controversies were pending between the plaintiff and defendant as to whether the defendant was indebted to the plaintiff in a certain sum of money; and that thereupon, in consideration that the plaintiff would promise the defendant not to sue him for the recovery of the said sum in dispute, but would accept a smaller sum in full satisfaction, the defendant promised to pay such smaller sum. On general demurrer the declaration was held bad, because it did not allege that any debt was due from the defendant to the plaintiff, or that an action had been commenced for the recovery of any sum claimed. So in the present case, as the declaration does not show that the plaintiff had any interest in the premises except that which he reserved, it does not appear that his release and conveyance, although executed at the defendant's request, formed any legal consideration for the promise alleged to have been made by the latter. Our judgment must therefore be for the defendant.

Judgment for the defendant.

VICTORS v. DAVIES.

IN THE EXCHEQUER, APRIL 22, 1844.

[*Reported in 12 Meeson & Welsby, 758.*]

ASSUMPSIT. The declaration stated that the defendant, on the 6th of March, 1844, was indebted to the plaintiff in the sum of 10*l.* for money lent by the plaintiff to the defendant.

Special demurrer, assigning the following causes: That it is not alleged in the declaration that the money was lent to the defendant at his request, and that therefore there is no consideration to support the promise; nor does it sufficiently appear that the defendant was indebted to the plaintiff.

Pearson, in support of the demurrer. The declaration is insufficient for want of the averment that the money was lent to the defendant "at his request." [ALDERSON, B. How can there be a lender unless there be also a borrower?] A plaintiff is bound to allege a request wherever the consideration is executed. In the notes to *Osborne v. Rogers*¹ it is said that "a past consideration is not sufficient to support a subsequent promise, unless there was a request of the party, either express or implied, at the time of performing the consideration." And

¹ 1 Saund. 264, note 1.

in a note by the learned editors of the fifth edition it is added, "So even an affidavit (to hold to bail) of debt for money lent, and for goods sold and delivered, and for work and labor, has been held irregular because it omitted to state that it was 'at the instance and request of the defendant,' although it stated that it was 'to and for his use and on his account;'" for which they cite *Durnford v. Messiter*.¹ In *Chitty on Pleading*² it is also said, "In each of these counts upon an executed consideration, except that for money had and received, and the account stated, it is necessary to allege that the consideration of the debt was performed at the defendant's request, though such request might in some cases be implied in evidence." [PARKE, B. There is a very learned note of my brother Manning on this subject,³ in which he goes into the whole law with respect to alleging a request, and points out the error into which Mr. Serjeant Williams appears to have fallen in his comment upon *Osborne v. Rogers*. The note is thus: "The consideration being executory, the statement of the request in the declaration, though mentioned in the undertaking, appears to have been unnecessary. In *Osborne v. Rogers* the consideration of a promise is laid to be, that the said Robert, at the special instance and request of the said William, would serve the said William, and bestow his care and labor in and about the business of the said William; and the declaration alleges that Robert, confiding in the said promise of William, afterwards went into the service of William, and bestowed his care and labor in and about, &c. Here the consideration is clearly executory, yet Mr. Serjeant Williams, in a note to the words 'at the special instance and request,' says, 'these words are necessary to be laid in the declaration in order to support the action. It is held that a consideration executed and past—as in the present case the service performed by the plaintiff for the testator in his lifetime for several years then past—is not sufficient to maintain an assumpsit, unless it was moved by a precedent request, and so laid.' The statement, according to modern practice, of the accrual of a debt for, or the making of a promise for the payment of, the price of goods sold and delivered, or for the repayment of money lent, as being in consideration of goods sold and delivered, or money lent to the defendant at his request, is conceived to be an inartificial mode of declaring. Even where the consideration is entirely past it appears to be unnecessary to allege a request, if the act stated as the consideration cannot from its nature have been a gratuitous kindness, but imports a consideration *per se*. It being immaterial to the right of action whether the bargain, if actually concluded and executed, or the loan, if made and the moneys actually advanced, was proposed and urged by the buyer or by the seller, by the borrower or by the lender. *Vide* Rastall's Entries, tit. Dette; and Co. Ent., tit. Debt." There cannot be a claim for money lent unless there be a loan, and a loan imports an obligation to pay

¹ 5 M. & Selw. 446.² Vol. i. p. 353 (7th ed.).³ 1 Man. & Gr. 265.

If the money is accepted, it is immaterial whether or not it was asked for. The same doctrine will not apply to money paid; because no man can be a debtor for money paid unless it was paid at his request. What my brother Manning says, in the note to which I have referred is perfectly correct.]

POLLOCK, C. B. There cannot be a doubt about this case; the statement that the money was lent implies that it was advanced at the request of the defendant. There must be judgment for the plaintiff.

PARKE, B., ALDERSON, B., and ROLFE, B., concurred.

Judgment for the plaintiff.

BRADFORD v. ROULSTON.

IN THE IRISH EXCHEQUER, MAY 6, 7, AND JUNE 12, 1858.

[*Reported in 8 Irish Common Law Reports, 468.*]

THIS was an action for breach of a contract by the defendant to pay a sum of 55*l.*, the balance of the purchase-money of a vessel sold by the plaintiff to a third person.

The summons and plaint contained four special counts, and a count upon an account stated. No question arose upon the first, third, and fifth counts; but the second and fourth, which were framed upon a guaranty, were as follows:—Second count: That in consideration that the plaintiff, at the express instance and request of the defendant, would execute to one James Gribben and John M'Teague a bill of sale of a certain vessel of the plaintiff, the defendant contracted and agreed with the plaintiff to guarantee the payment to the plaintiff on the day following the making of such contract of the sum of 55*l.*, being the balance of the purchase-money payable by the said John M'Teague in respect of such bill of sale; and the plaintiff avers that, relying on the said contract and agreement by the defendant, he did execute such bill of sale, and did perform all things on the part of him the said plaintiff in relation to the said contract to be performed; but the plaintiff avers that neither of them, the said James Gribben or John M'Teague or the defendant, did pay the said sum of 55*l.* or any part thereof on the day aforesaid or since, and the same still remains wholly unpaid; of all which said defendant had notice.

Fourth count: That it had been agreed between the plaintiff and one James Gribben and John M'Teague, that the plaintiff should execute to them a bill of sale of a certain other vessel of the plaintiff for the price or sum of 230*l.*; and the plaintiff avers that at the time of executing such last-mentioned agreement the said John M'Teague

omitted to pay over to or for the plaintiff the sum of 55*l.*, being the balance of the purchase-money payable by the said John M'Teague in respect of such last-mentioned agreement; and the plaintiff avers that he the said plaintiff was thereupon unwilling to execute such bill of sale; and the plaintiff says that defendant then expressly requested the plaintiff to execute the said bill, and that in consequence of such request the plaintiff did actually execute the same; and the plaintiff avers that the defendant did afterwards, in consideration of the plaintiff having so executed said bill of sale at the instance and request of the defendant, guarantee to the plaintiff the payment to him by the said John M'Teague of the sum of 55*l.* on the day following the execution of such bill; but the plaintiff says that neither the said John M'Teague or the defendant did pay the said sum of 55*l.* or any part thereof on the day agreed on or since, but same still remains wholly unpaid; of all which the defendant had notice.

The defendant, by his defences, traversed the making of the contract stated in the summons and plaint; and the issues settled upon the pleadings were in substance whether the defendant contracted as alleged?

At the trial before Ball, J., at the Spring Assizes of 1858 for the county of Antrim, a letter of the defendant, which it appeared was written subsequently to the transaction stated in the pleadings, was relied upon by the plaintiff as a guaranty for the payment of the 55*l.* The jury, upon a question submitted to them, found that this letter was a guaranty; and his Lordship thereupon directed a verdict for the plaintiff on the second and fourth counts, reserving liberty to defendant to move to have a verdict entered for him upon the second count. Upon the other counts the jury found a verdict for the defendant.

R. Andrews having on the part of the defendant obtained a conditional order to have a verdict entered for him on the second and fourth counts, or that judgment upon the fourth count should be arrested,

The *Solicitor-General* and *F. R. Falkiner* now showed cause.

R. Andrews and *M. Harrison*, contra.

A full statement of the material facts of the case, the arguments of counsel and the cases cited, will be found in the judgment of the Lord Chief Baron. *

Cur. adv. vult.

PIGOT, C. B. By the conditional order in this case the defendant seeks to have a verdict entered for him as to the second and fourth counts of the plaint, or (as to the fourth count) that judgment be arrested. It appears from the report of the learned Judge, that the reservation made by him, and the objection to the evidence on which it was founded, applied to the second count only. The questions before us therefore are, Whether the verdict shall be entered for the defendant on the issue as to the second count? and Whether judgment shall be arrested as to the fourth? The plaintiff desiring to retain his

verdict on both counts, it becomes necessary to determine both questions.¹ . . .

The defendant by the conditional order also seeks to arrest the judgment on the fourth count. The plaintiff obtained a verdict upon the issues joined on that count; and as to this no point was saved, and no objection was made at the trial. The fourth count states an agreement, by which the plaintiff agreed to execute a bill of sale of a vessel to Gribben and M'Teague for 230*l*. That at the time of executing that agreement M'Teague omitted to pay the plaintiff 55*l*., being the balance of the purchase-money payable on that agreement; that the plaintiff being unwilling to execute the bill of sale, the defendant expressly requested him to do so, and that in consequence of that request the plaintiff executed the bill of sale; and the count then states that "the defendant did afterwards, in consideration of the plaintiff having so executed said bill of sale, at the instance and request of the defendant, guarantee to the plaintiff the payment to him by the said John M'Teague of the sum of 55*l*. on the day following the execution of such bill of sale." The question is, Whether this count is bad?—the contract alleged being upon an executed consideration, and not being a contract which, from such consideration, the law would imply.

It is clearly established that, where a past consideration, that is, a thing previously done by the plaintiff at the request of the defendant, is one from which the law implies a promise, an express promise different from, or in addition to, that which the law implies, is *nudum pactum*, on the ground that the whole consideration is exhausted by the promise which the law implies. Among those authorities are *Brown v. Crump*,² *Granger v. Collins*,³ *Hopkins v. Logan*, *Roscorla v. Thomas*. And this principle of law was recognized and approved in *Kaye v. Dutton* by Lord Chief Justice Tindal, and also in all the stages of *Elderton v. Emmens*.⁴ This is in exact conformity with the opinion of Rolfe, expressed at the end of his report of *Hodge v. Vavisor*, and it is involved in the decision of *Docket v. Voyel*. But it has also been held, in a long series of decided cases, that where there is a past consideration, consisting of a previous act done at the request of the defendant, it will support a subsequent promise; the promise being treated as coupled with the previous request. The leading authority for this proposition is *Lampleigh v. Brathwait*. But it has been so laid down in a great number of ancient authorities. In *Hunt v. Bate*, called in several of the books *Hunt v. Baker*, the defendant's servant was arrested and imprisoned in the Compter in London for trespass. The plaintiff and another, in order that the defendant's business "should not go undone," bailed the servant. The defendant afterwards promised the plaintiff to save him harmless from all damages and costs that might be adjudged against him in consequence of becoming the servant's bail. The plain-

¹ Only so much of the opinion is here given as relates to the second question.—Ed.

² 1 Marsh. 567.

³ 6 M. & W. 458.

⁴ 4 C. B. 479; s. c. 6 C. B. 160; s. c. 4 H. L. Cas. 624.

tiff brought an action upon this promise for the amount of damages he was compelled to pay as the servant's bail; and after verdict for the plaintiff the judgment was arrested, "because" (the report states) "there is no consideration wherefore the defendant should be charged for the debt of his servant, unless the master had first promised to discharge the plaintiff before the enlargement and mainprize made of his servant; for the master did never make request to the plaintiff for his servant to do so much, but he did it of his own head. But," the reporter adds, "in another like action on the case, brought upon a promise to pay 20*l.*, made to the plaintiff by the defendant, in consideration that the plaintiff, at the special instance of the defendant, had taken to wife the cousin of the defendant, that was good cause, although the marriage was executed and past before the undertaking and promise, because the marriage ensued the request of the defendant." Several cases are referred to in the notes (ascribed to Chief Justice Treby) which are appended in 3 Dyer, p. 272, to the report of the case of *Hunt v. Bate*. In two of these, *Halifax v. Barker* and *Sandhill v. Jenny*¹ (not reported elsewhere), it is stated that a promise founded upon a previous matter done by the plaintiff at the defendant's request, was held insufficient; but such a promise was held binding in each of four other cases, one of which was decided by all the judges. These were *Riggs v. Bullingham*, *Baxter v. Read*² (not reported elsewhere), *Gale v. Golsbury* (the history of which is given in the note, 3 Dyer, 272 *b*), and *Sidnam v. Worthington*. *Sidnam v. Worthington* was in substance the same as *Hunt v. Bate*, with only the difference that the plaintiff became bail at the request of the defendant. In *Gale v. Golsbury*, the defendant requested the plaintiff to deliver 600*l.* worth of wine to J. S.; and the defendant, in consideration that the plaintiff, at defendant's request, had delivered the wine to J. S., promised to pay him if J. S. did not. The action was brought for 200*l.* remaining unpaid; "and adjudged by all the judges of England that an action lies by Gale against Gols-

¹ "H. 2 Jac. B. R. The plaintiff declared that, in consideration that the plaintiff had formerly married his daughter at his especial request, the defendant promised the plaintiff to pay him every year during the life of the defendant, 10*l.*, &c. The plaintiff, upon *non assumpsit* pleaded, had judgment; but upon writ of error in the Exchequer Chamber the judgment was reversed, because the marriage was executed before the promise made; yet the declaration supposes that the defendant requested the plaintiff to the marriage." — Ed.

² "M. 26 & 27 Eliz. Adjudged that where Baxter had retained Read to be miller to his aunt at ten shillings per week, debt does not lie upon this, but an action on the case; for in debt it is requisite that [the benefit] come to the party who promises: and so for the want of a *quid pro quo* debt does not lie: but, by the Court, this will support an action on the case, for although it is not beneficial to Baxter it is chargeable to Read." — Ed.

³ *Golsbury* requests *Gale* to deliver to J. S. six hundred pounds' worth of wine: afterwards *Golsbury* promises *Gale*, in consideration that he at his request had delivered it to J. S., to pay him if J. S. did not; J. S. paid only three hundred pounds; and adjudged by all the judges of England that an action lies by *Gale* against *Golsbury*. — Ed.

bury.” If the law was truly declared in these decisions, they are direct authorities for the plaintiff in support of the fourth count of this plaint.

The report of the case of *Hunt v. Bate* in *Dyer* is referred to and recognized in a variety of subsequent cases, as laying down a principle of law with reference to past considerations by which those decisions were influenced. It was so referred to in *Sidnam v. Worthington*,¹ in *Marsh and Rainsford's Case*, in *Dogget v. Dowell*, in *Bosden v. Thinne*, in *Jones v. Clarke*,² in *Townsend v. Hunt*, in the leading case of *Lampleigh v. Brathwait*, and in *Oliver v. Wood*. The principle was applied in many of the old authorities collected in 1 Rolle's Abr. p. 11, *Action sur le Case* (Q.) and in the corresponding title, 1 Vin. Abr. p. 29, where the abstracts of the cases in Rolle's Abr. are translated, and several others are added: *placita* 2, 3, 4, 5, 6, 7, 8, 18, 19, 38, 40, 43, 49. Also in Com. Dig., *Action on the Case upon Assumpsit* (B. 12), where the cases are distinguished from those in which the action does not lie, collected at (F. 6). Coming down to later times, we find in *Hayes v. Warren* a decision which has been repeatedly treated as the ruling modern authority for the proposition that assumpsit will not lie upon a promise for a past consideration, unless it be at the request of the defendant. In the report of that case in 2 Barnard., p. 141, the Lord Chief Justice (Raymond), in giving judgment, referred to the case in Cro. Eliz., p. 741 (*Halifax v. Barker*, one of the cases cited in the note to 3 Dyer, p. 272). There the action was assumpsit: “whereas, in consideration that the plaintiff, by the defendant's appointment and for his debt, shortly before paid to R. S. 60*l.*, the defendant assumed to pay it upon request.” And it is reported in Cro. Eliz., p. 741, that the Court held the consideration was past, and not sufficient. The Lord Chief Justice, according to the report of *Hayes v. Warren*,³ states: “They,” the Court, “did agree likewise, that where there was an express request at the time of the past consideration being performed, that might in all cases be sufficient to support a subsequent promise; and therefore the Chief Justice said he could not agree the case cited out of 3 Cro., p. 741, to be law.” And unquestionably that case is directly opposed (if it was not so decided upon the term “appointment,” as not indicating request) to the express decisions in the same book, Cro. Eliz., pp. 42, 59, 807. It is clear that the Court in *Hayes v. Warren* affirmed the principle of law laid down in *Hunt v. Bate* and *Lampleigh v. Brathwait*. And Mr. Justice Wilmot, who in *Pillans v. Van Mierop* quarrels with the decision in *Hayes v. Warren* as too much restricting contracts, treats it as “now settled that, where the act is done at the request of the person promising, it will be a sufficient foundation to graft a promise upon.”

This rule of law was the foundation of express decision in *Wilkinson v. Oliveira*. It was recognized in Lord Denman's judgment in *Eastwood*

¹ Godb. 31, 27 Eliz.

² 2 Bulst. 73, 11 Jac. 1.

³ 2 Barnard. 141.

v. Kenyon, in that of Lord Chief Justice Tindal in *Kaye v. Dutton*, and in that of Mr. Justice Littledale in *Payne v. Wilson*. But in *Roscorla v. Thomas* Lord Denman intimated an opinion which, in one construction of the language, would seem to lay down as a general rule of law, that a past or executed consideration will support no promise save one which the law would imply from it; that proposition importing, not merely that where a promise would be implied by law, and would therefore exhaust the consideration, no other express promise will be sustained by the same past consideration, but, further, that no promise at all will be sustained by such consideration, unless a promise would be implied from it by law, and then only such a promise as would be so implied.

The proposition in that extended sense has never been the subject of express decision. It did not arise in *Brown v. Crump*,¹ in *Hopkins v. Logan*, in *Granger v. Collins*,² in *Eastwood v. Kenyon*, in *Beaumont v. Reeve*, in *Jackson v. Cobbin*,³ in *Lattimore v. Garrard*,⁴ in *Elderton v. Emmens* in any of its stages, nor even in *Roscorla v. Thomas*. In each of these cases (except *Beaumont v. Reeve*) the law implied from the consideration a promise which exhausted it. In *Elderton v. Emmens* the Court of Common Pleas held that the express promise went beyond the implied one, and therefore could not be sustained. The Court of Exchequer Chamber and the House of Lords held that the express promise was only equivalent to the implied one, and they therefore sustained it. In *Beaumont v. Reeve* the declaration stated in effect that the defendant had seduced the plaintiff, and thereby rendered her incapable of procuring an honest livelihood; that they had parted, and agreed to live separate, and to have no further immoral intercourse together; and that as a compensation for the injury which the defendant had done to the plaintiff, and in consideration of the premises, he undertook and promised to pay her a yearly sum of 60*l*. There was in that case plainly no consideration for the promise but the moral obligation to repair a wrong. No precedent request or solicitation, either express or involved in the fact of seduction, could have created any sufficient consideration; for the immoral intercourse, with or without an express request, could not have formed any legal consideration, either executory or executed, for a valid promise. It was therefore within the direct authority of *Eastwood v. Kenyon*, in which, on a review of the authorities, it was determined that a mere moral obligation will not support an *assumpsit*; and this appears to be the ground of the judgments, in *Beaumont v. Reeve*, of Mr. Justice Patteson and Mr. Justice Coleridge. Lord Denman, in *Beaumont v. Reeve*, expounds his own meaning of the proposition which he states in *Roscorla v. Thomas*, thus: "The result is that an express promise cannot be supported by a consideration from which the law could not imply a promise, except where the express promise

¹ 1 Marsh. 567.

² 8 M. & W. 790.

³ 6 M. & W. 458.

⁴ 1 Exch. 809.

does away with a legal suspension or bar of a right of action which, but for such suspension or bar, would be valid ;" a proposition which, by the generality of its terms, would exclude the case of a promise of a defendant, founded on a previous benefit rendered to the defendant at his request. I am not sure whether Baron Parke in *Elderton v. Emmens*,¹ or in *Lattimore v. Garrard*,² and Mr. Justice Maule in *Emmens v. Elderton*,³ adopted the proposition in that extended sense, or meant to confine it, as it appears to have been confined by Lord Truro, in 4 Com. B., p. 494, and 4 H. of L. Cas., p. 672 ; by Mr. Justice Maule, in 4 Com. B., p. 496 ; by Mr. Justice Cresswell, in 4 Com. B., p. 497 ; and Mr. Justice Crompton, in 4 H. of L. Cas., p. 639 ; and as Lord Chief Justice Tindal appears to have done in *Kaye v. Dutton*,⁴ to cases where the consideration is one from which the law does imply a promise, which therefore exhausts the consideration. The reporter certainly understood the language used in 4 Com. B., p. 496, to be so confined, as appears from his note at that page of his report ; and it is perfectly plain that the decision or the judgment in which it was pronounced in *Eastwood v. Kenyon*, or the note to *Wennall v. Adney*,⁵ to both of which Lord Denman refers in his judgment in *Roscorla v. Thomas*, give no sanction to a denial of the rule of law laid down in *Hunt v. Bate*, and *Lampleigh v. Brathwait*. Lord Denman, in *Eastwood v. Kenyon*, not only refers to that rule, and to both those cases as establishing it, but refers also to *Townsend v. Hunt*, as recognizing and acting on the distinction which those cases establish and explain, between a past consideration with, and a past consideration without, a precedent request ; and he precedes those references by the following passage : " In holding this declaration bad, because it states no consideration but a past benefit, not conferred at the request of the defendant, we conceive that we are justified by the old common law of England." In the note to *Wennall v. Adney* the case of *Lampleigh v. Brathwait*, and the distinction there explained, is explicitly stated without any denial of its authority.

I have thought it necessary to enter into this detailed discussion, because the language of the judges, in some of the cases I have cited, is so general that it would seem to sustain the objection to the fourth count of the plaint before us. It is very much to be lamented that the language so used (as reported) was not accompanied with such explanation as would have clearly shown whether the learned judges intended to declare that in their opinion the rule laid down in *Hunt v. Bate*, *Lampleigh v. Brathwait*, and *Wilkinson v. Oliveira*, and in the multitude of other decided cases which I have mentioned, or the exposition of that rule in *Kaye v. Dutton*, was or was not law. In no one of the cases in which the language to which I have referred was used by them, was any one of those authorities named ; in no one was it

¹ 6 C. B. 174.² 1 Exch. 809.³ 4 H. L. Cas. 658.⁴ 7 Man. & G. 815, 816.⁵ 3 Bos. & P. 249.

stated that the rule which those authorities expounded and applied was to be no longer treated as a rule of law. I own it appears to me that a rule so well and so long established, if inexpedient, ought to be abrogated, if at all, by an act of the Legislature; or, if otherwise reversed, ought to be reversed only by the highest appellate tribunal, especially when the change would have the effect of narrowing the sphere within which mankind shall be permitted to bind each other by their deliberate dealings.

Notwithstanding, then, the expressions of opinion of the learned judges which I have referred to, unnecessary for determining the questions judicially before them (even if they conveyed the more extended meaning on which I have commented), I cannot, in deference to those expressions of opinion, pronounce a judgment reversing a series of decisions made by successive judges, and establishing a rule of law that has been understood to prevail for certainly more than two centuries.

We refuse to arrest the judgment on the fourth count, or enter a verdict on the second; and our order will therefore be to allow the cause shown against the whole of this conditional order.

PENNEFATHER, B., concurred.

RICHARDS, B. Whenever, in the case of a past or executed consideration, the law implies a promise, I take it that no promise can be supported other than that which the law so implies; for the promise implied by the law exhausts the whole of the consideration; and so I would explain the case of *Roscorla v. Thomas*, and some other like cases to which we have been referred. But where the law will not imply any promise, I am of opinion that in many cases an express promise, though founded on a past or executed consideration, may be supported; as if A. does an act for B. at his request, and more especially if he does it to his, A.'s, detriment, and B. afterwards, in consideration of such past act, promises to remunerate A., or the like, I am of opinion that such a promise would in a sense unite itself with B.'s previous request, and with the compliance by A. therewith, and would be perfectly valid and binding in law, though resting on a past or executed consideration.

There is a vast difference in fact and in law between a service gratuitously rendered, and the like service performed or act done at the request of another person. A voluntary courtesy will not support a promise subsequently made; neither will a mere moral obligation, however sacred, where there has not been any previous request to do the act or render the service relied on. *Eastwood v. Kenyon*. But in this case the fourth count alleges that the act of the plaintiff, which is relied on as forming the consideration for the defendant's promise, was done at the request of the defendant.

No doubt it is on an executed consideration that the plaintiff relies; and if such a consideration be not sufficient in law to sustain the promise as laid in the fourth count, the motion in arrest of judgment, so far

as the verdict is rested on that count, ought to prevail. But in my opinion the consideration, though a past act of the plaintiff's, is, as laid in the fourth count or paragraph, a perfectly good consideration for the defendant's promise. The cases bearing, or that could by any construction be supposed to bear, on this subject, have been already so fully and laboriously collected and observed upon by my Lord Chief Baron, in his very able and most elaborate judgment, that I think it unnecessary to refer to those cases again. Indeed, the most of them, and I will say the most important of them, will be found collected and discussed in a note to *Lampleigh v. Brathwait* in the first volume of Mr. Smith's *Leading Cases*.

With regard to the case of *Emmens v. Elderton*, ultimately reported in 4 House of Lords Cases, there was in that case a manifest attempt on the part of the pleader to lay a promise in his declaration more extensive than the express promise contained in the agreement that it appeared in that case had been entered into between the parties; and, no doubt, in such a case the additional promise, I mean a promise not found within the contract of the parties (and supposing it to have been so expressed in the declaration), being, as I have mentioned, outside the agreement, and having no consideration to rest on save that which was exhausted by the previous special contract of the parties, ought not, if my view of the law be right, to be supported; and, accordingly, the Court of Common Pleas, before which court the case first came, taking that view of the pleading, arrested the judgment; and if the construction which the Court of Common Pleas put on the agreement as set out in the declaration in that case was correct, the decision of that Court would have been upheld. But the Court of Error, and ultimately the House of Lords, reversed the decision of the Common Pleas, but expressly on the ground that the promise so relied on by the plaintiff was not necessarily to be construed as made subsequently to the agreement concluded between the parties, or as falling outside of that agreement. The promise in that case, or rather the pleader's statement of it, would admit of two different interpretations, at least so thought the House of Lords; and their Lordships, after a little straining, ultimately considered it right to give the pleading that construction that would support the verdict, rather than a construction that would defeat the action.

All I need say, therefore, with reference to *Emmens v. Elderton* is that the Court of Common Pleas understood the agreement as stated on the pleading in one sense, and so arrested the judgment; whereas the House of Lords, understanding the agreement as stated in the declaration in a different sense, ruled differently. But neither in the one court nor the other does the principle which I have ventured to express appear to me to have been overruled.

Upon the whole, I am of opinion that the fourth count or paragraph in the plaint is good, and that the motion in arrest of judgment ought to be refused.

I think it unnecessary to say any thing upon the other question that has been argued before us ; and I fully concur in the judgment already expressed by my Lord Chief Baron upon the point, and indeed I could add nothing to his observations.

PIGOT, C. B. My brother GREENE has authorized me to state that, after some fluctuation of opinion, he concurs in the judgment of the Court.

CHAPTER III.

CONDITIONAL CONTRACTS.

SECTION I.

Conditions Precedent.

ANONYMOUS.

IN THE KING'S BENCH, TRINITY TERM, 1500.

[*Reported in Year Book, 15 Henry 7, folio 10 b, placitum 7.*]

NOTA PER FINEUX, C. J. If one covenant with me to serve me for a year, and I covenant with him to give him 20*l.*, if I do not say for said cause, he shall have an action for the 20*l.* although he never serves me; otherwise, if I say he shall have 20*l.* for said cause. So if I covenant with a man that I will marry his daughter, and he covenants with me to make an estate to me and his daughter, and to the heirs of our two bodies begotten; though I afterwards marry another woman, or his daughter marry another man; yet I shall have an action of covenant against him, to compel him to make this estate; but if the covenant be that he will make the estate to us two for said cause, then he shall not make the estate until we are married. And such was the opinion of the Court. And REDE, J., said it was so without doubt.

BROCAS' CASE.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1588.

[*Reported in 3 Leonard, 219.*]

BROCAS, lord of a manor, covenanted with his copyholder to assure to him and his heirs the freehold and inheritance of his copyhold. And the said copyholder, in consideration of the same performed, covenanted to pay such a sum. It was the opinion of the whole Court, that the said copyholder is not tied to pay the said sum before the

assurance made and the covenant performed. But if the words had been, *in consideration of the said covenant to be performed*, then he is bounden to pay the money presently, and to have his remedy over by covenant.

ANONYMOUS.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1590.

[Reported in 4 Leonard, 50.]

A LEASE for years is made by deed indented, rendering rent, and the lessor covenants that the lessee, paying his rent, shall enjoy the land demised for the whole term; the lessee did not pay the rent, and afterwards is ejected by a title paramount. By WALMESLEY and WINDHAM, JJ., that the covenant is conditional, and that the lessee should not have advantage of it, if he did not perform the condition, which is created by this word "paying." PERIAM, J., was strongly to the contrary, viz, that the word "paying" did not create a condition.

RAYNAY v. ALEXANDER.

IN THE KING'S BENCH, MICHAELMAS TERM, 1605.

[Reported in Yelverton, 76.]

THE plaintiff declared that, whereas the defendant was possessed of seventeen tods of wool, and whereas *colloquium fuit* betwixt them for fifteen tods of the seventeen tods, to be chosen by the plaintiff, the defendant, in consideration of 6*l.* to be paid on such a day, &c., promised to deliver the plaintiff *prædictas* fifteen tods of wool; and said *in fact* that he was ready at the day to pay the 6*l.*, yet the defendant had not delivered the plaintiff the fifteen tods of wool, to his damage, &c. And upon *non assumpsit* pleaded, it was found for the plaintiff. And it was shown in arrest of judgment, that the declaration was not good, because the plaintiff had not shown that he had chosen fifteen tods out of the seventeen; and that is *quasi* a condition precedent, and an act to be first performed by the plaintiff, before the defendant is bound by his promise to do any thing. *Quod fuit concessum per totam Curiam*. But *per* POPHAM, C. J. If the defendant had sold one of the tods of wool before election made by the plaintiff, that had destroyed the election and made the promise absolute, and had been a breach of it. The same law if the defendant would not have permitted the

plaintiff to see the wool that he might make election; for that had excused the act to be done by the plaintiff, and had been a default in the defendant. And the matter aforesaid is much enforced by the word *prædictas* in the declaration; for that can be referred to nothing but the communication, by which the plaintiff of his own showing ought to make election. Then the plaintiff, omitting it in his declaration, shows the fault is in himself, which ought to be removed before he can charge the defendant. But if the communication had been that the plaintiff should choose fifteen tods of the seventeen, and the plaintiff had declared the promise to be to deliver fifteen tods generally, without saying *prædictas*, there, if the promise had been found, the plaintiff should have judgment; for the *colloquium* might have been conditional and the promise absolute. *Quod nota.* But the judgment was *Nil capiat per billam.*

SLATER v. STONE.

IN THE KING'S BENCH, MICHAELMAS TERM, 1622.

[Reported in *Croke James*, 645.]

COVENANT. Whereas he by indenture let and demised a house in Barleyhurst to the defendant for twenty-one years from Michaelmas following, and the defendant covenanted, *quod ab et post emendationem et reparationem dicti messuagii* by the plaintiff, his heirs and assigns, he at his proper costs and charges, as need should require, *bene et sufficienter repararet et sustineret* the said messuages during the said term, and so at the end of the term would leave them well and sufficiently repaired; and allegeth the breach, that at the time of the demise and beginning of the term one dove-house, parcel of the premises, was in good and sufficient reparation; and that the defendant *voluntariè* during the term suffered it to stand uncovered for a year, whereby it became very ruinous, and afterwards pulled it down, so as it became of no value.

The defendant pleaded, that he did not suffer it to stand uncovered, nor pulled it down, &c.; and thereupon they were at issue, and found for the plaintiff.

It was moved, in arrest of judgment, that the breach is not well assigned: for the covenant is, "that *ab et post* the plaintiff hath repaired it, that he would maintain it in reparation;" so the defendant is not to repair it until the plaintiff hath first repaired it.

And the whole Court (*absente* LEA, C. J.) was of that opinion. And although it was objected that the plaintiff, having alleged it to be in good reparation *tempore dimissionis et in initio termini*, needed not to repair it when it was not necessary, but that refers

to all parts of the house which require reparation, yet *non allocatur*: for the Court held, that the covenant being "*quod ab et post reparationem* by the plaintiff, then he would sustain," &c., it is conditional that the plaintiff ought first to repair it: so, although it were in good reparation at the beginning, if it afterwards happen to decay, the plaintiff is first to repair it before the defendant is bound thereto. Wherefore it was adjudged for the defendant.

HOLDIPP, *Executor of Dowse*, v. OTWAY.

IN THE KING'S BENCH, EASTER TERM, 1670.

[*Reported in 2 Williams' Saunders*, 106.]

ERROR, by Holdipp, executor of Dowse, plaintiff, against Otway, defendant, to reverse a judgment in an action of debt in the Common Pleas, in which Otway, then plaintiff, declared against Holdipp as executor, &c., upon a bill obligatory, made by the testator, 24th Nov. 1650, whereby the testator acknowledged himself to be indebted to the plaintiff in 68*l.*, which he covenanted and promised to pay to the plaintiff, or his assigns, as soon as several bills of costs of the testator, expended in the prosecuting of several suits in law and equity for Mr. Robert Riggs and Margery Riggs, deceased, should be duly audited, debated, and settled by two attorneys, to be indifferently chosen between them to examine and state the accounts of the said bills of costs, the plaintiff paying to the testator his proportionable part, that is to say, the third part, of the said bills, to be in form aforesaid debated and settled. And the plaintiff, by protestation that he was always ready to perform all things on his part, and also by protestation that there was not any sum of money due to the testator upon any bill of costs by him expended in prosecuting any suits for the said Robert Riggs and Margery Riggs, the plaintiff in fact said, that neither the testator in his lifetime, nor the defendant upon his death, did ever show or produce any bills of costs, expended in the prosecution of the said suits, to be audited, debated, and settled according to the tenor of the said bill; whereby an action accrued to the plaintiff to demand and have the said 68*l.* of the defendant: and upon this declaration the plaintiff had judgment by default in the Common Pleas:¹ . . . whereupon the defendant brought a writ of error into the King's Bench; and *Saunders*, of counsel with the plaintiff in the writ of error, assigned an error in the declaration, that the plaintiff in the Common Pleas had not sufficiently entitled himself to his action for the 68*l.* on the bill obligatory mentioned in the declaration; for it was not

¹ This case has been modified by the omission of irrelevant matter. — ED.

to be paid until the bills of costs were debated and settled by two attorneys, to be indifferently chosen by the testator and the plaintiff, Otway; and Otway, the plaintiff in the Common Pleas, has averred that the testator had not shown or produced any bills of costs: which is nothing to the purpose; for he was not bound to show or produce any bills, except only to the two attorneys to be chosen to examine and state them; but the plaintiff in the Common Pleas ought to have averred that there were two attorneys chosen, and the testator did not produce the bills of costs to them to be settled, or that the plaintiff had chosen one attorney, and required the testator to choose another, to examine and settle the bills, which he refused to do; whereby it might have appeared to the court that there was no fault in the plaintiff, but a fault in the testator. But now it does not appear upon the record that the moneys are yet payable; for they were payable upon the settling of the bills of costs by the two attorneys; and this does not appear to be done, nor that there was any fault in the testator why it was not done, and therefore the 68*l.* does not appear to be yet due according to the tenor of the said bill obligatory. And of this opinion was the whole Court; whereupon a rule was given to reverse the judgment, *nisi*, &c., but *Jones*, of counsel with the defendant in the writ of error, said that he could not maintain the judgment; and therefore he prayed that it should be reversed for the expedition of his client, who intended to bring a new action; wherefore the judgment was reversed absolutely.¹

THORPE v. THORPE.

IN THE KING'S BENCH, EASTER TERM, 1701.

[*Reported in 12 Modern*, 455.]

ERROR from the Court of Common Pleas of a judgment in an action on the case, wherein the plaintiff declared, that the defendant had and held of him by way of mortgage two closes of copyhold lands; and that there was a discourse between them concerning the plaintiff's releasing his equity of redemption therein to the defendant, and concerning divers sums of money due from the plaintiff to the defendant upon the said mortgage; upon which the plaintiff did agree with the defendant that he would release to him the said equity of redemption, in consideration of which the defendant did agree with the plaintiff to pay him seven pounds above all that was due; and that, in consideration that the plaintiff promised the defendant to perform all of his side, the defendant promised the plaintiff to perform of his side; and avers that he did perform all on his, the plaintiff's, side, but that the defend-

¹ Cited and approved in *French v. Campbell*, 2 H. Bl. 178-80. — Ed.

ant paid one pound seven shillings of the said seven pounds, and no more, &c.

To this the defendant pleads in bar, that long after the promise, viz., 29th July, 1694, the plaintiff did, by indenture made between him and the defendant, release to the defendant "all manner of actions, suits, debts, duties, sum and sums of money, and all demands whatsoever, which ever he had, or he, his heirs, executors, or assigns ever should have, for or by reason of any thing, matter, or demand whatsoever."

Upon *oyer* of this deed of release, it recited the said mortgage, and released "all provisos therein, and all his estate, right, title, and interest in the said close, both in law and equity;" and then follows the foregoing clause.

And upon this the plaintiff demurred, and judgment for the plaintiff in the Court of Common Pleas.

Cowper, for the plaintiff in error, objected to the declaration, that the consideration set forth in it was not sufficient to support a promise; for, though equity of redemption be a thing pretty well known, and for the most part valuable, yet some may be not of any value, and this may be of them; and therefore it was necessary to show that it was of some value; and for an example of an equity of redemption without value, he put this case: If a mortgage be till so much money be raised by the mortgagee out of the profits; here the mortgagor has an equity of redeeming by payment of the money and charges, and yet it is of no value to the other to have it released; but to the contrary, the redemption there would be rather a benefit to him.

Secondly, he objected that it did not appear by the count that the mortgage was forfeited, and then the plaintiff had no equity of redemption. *Ergo*, no consideration for the promise; *ergo*, &c. *Vide* 2 Saund. 136; Style, 248.

Then the plea in bar is good, for the release is full in words, and subsequent to the promise. But, say they, the money was to be paid in consideration of the release; therefore the release, which created the duty, cannot *in eodem instanti* extinguish it. To this I answer, that the payment of the money does not arise from the release, but from the promise; and the promise, and not the release, being the consideration of the debt, action lies upon the mutual promises before the release. *Ergo*, the release comes after the cause of action, and consequently destroys it. March, 75. Where promises are their own mutual considerations, there needs no performance to support the action. Hob. 88. In consideration that the plaintiff promised to deliver the defendant a cow, the defendant promised the plaintiff fifty shillings; in an action for the money there needs no averment of delivery of the cow, or *vice versa*. Cro. El. 543. A declaration, that in consideration A. was indebted to B. by bills, and that he promised to deliver him up the bills, he promised to give him good security by bond for the money, and avers the delivery of the bills; the defendant traverses the delivery, and on demurrer adjudged against him, because not material; and it was not the

consideration of the assumpsit, but the promise to deliver was it. Cro. El. 703, *simile*.

But Cro. El. 889, the promise is, *super solutionem* of such a sum, to do, &c.; therefore the thing not demandable before payment. So is Cro. Car. 19. So that if here the cause of action did arise upon the promise before any release made, the release subsequent clearly discharges it; *secus* not, if there were no more in the case. And if the release be what gives them cause of action, then they should show a release made, or a tender of it; and not generally, as here, that they have performed all of their side.

But it is objected that, although an action had accrued to the plaintiff immediately upon the promise, yet this release should not discharge it; for that the release shall be taken according to the intent of the parties, which was only to discharge the equity of redemption; and the general words of it shall be restrained and qualified by the foregoing special words. But I answer, that after releasing the equity of redemption by express words, there are in the self-same clause general words of "all actions and demands;" which I agree are qualified by the special words and intent of the parties. And then comes the clause in question, distinctly and separately from the first, releasing "all actions and demands;" and this clause would be entirely useless if they be applied to the first, because the first has a general clause in itself to serve it as a wall or muniment, and so stands in no need of any more. 2 Roll. Ab. 409. The general words, that are restrained by the special words, are part of the same clause and sentence, and not, as here, distinct and separate. 3 Mod. 277. Suppose A. recited in a deed, that whereas B. owes him ten pounds, and releases thereby "the said ten pounds, and all actions and demands," and further proceeds and releases him "all debts, duties, actions, and demands," would this last clause be rather entirely rejected than extended to any thing but the ten pounds? and upon this diversity Hetley, 9 and 15, Aubry's Case, is distinguishable from the present case.

Cheshire, contra. As to the want of averring that we have made a release, they in their plea show that we have done it, and set it forth; and that supplies that defect, if any; for many times the fault of a declaration may be helped by the defendant's plea; as the want of a venue by pleading a release. Cro. Eliz. 68, Debt upon a bond. And it did appear by the bond that the day of payment was not yet come; the defendant pleaded a release, and found against him, and plaintiff had judgment; for that by pleading the release he waived the other advantage; and 9 Edw. 4, there cited, Debt by an executor; the defendant pleaded that the testator had made two executors, and that one of them released to him; and issue thereupon found for the plaintiff, who had judgment, though the defendant might have abated the action, because he waived that advantage by his plea. 3 Cro. 111; 2 Keb. 766; 1 Vent. 114, 126.

And this Court will take notice what an equity of redemption is, as

well as a court of equity of trusts and mortgages. 4 Leon. 225 ; 1 Vent. 41. That the Court will take notice of an equitable consideration ; and we need not show what our equity of redemption was, or how created. For first, they requested we should release such a thing to them ; and it cannot be imagined they would do so if we had none. Indeed, if it had appeared to the Court that our equity was of no value, it would have been the stronger against us ; though even so, there being something to be done by us that would be a trouble to us, it would have been a good consideration of a promise. And if, in the case quoted out of Saunders, the heir had recited that he was bound by the bond, the Court would intend it so, and give judgment against him. And in all the cases that have been put of the other side, it did appear to the Court that there was nothing of value, or any pain or trouble to the plaintiff, to be the consideration of the promise ; and there is a diversity between a thing's appearing not to be valuable, and its not appearing to be valuable ; for a recital of it will help it in the one case, but not in the other. Raym. 19. To make a promise good, the one party, viz., he that does promise, ought to have some charge or trouble by the performance, or the other some advantage.

And the words of release are not sufficient to discharge the promise, because it was not in demand at the time of the release ; for the release was a condition precedent, whereupon the demand did arise to the plaintiff, and therefore the release could not destroy that to which it gave birth.

But suppose an action did arise upon the mutual promises, yet each party had a reasonable time to perform ; and perhaps each had time for his life, if not hastened by request ; and neither is alleged here. Indeed the promise as soon as made was releasable by the word "promise," but not by the words "actions or demands," at least till a convenient time after ; which is not alleged to have been between the promise and release.

And it is not absolutely necessary the words insisted on in this release must be rejected as fruitless, without they are extended to release this demand ; for it may be, the mortgagee might be accountable to the mortgagor for some of the profits of the lands, which might be released by the words.

HOLT, C. J. A release of an equity of redemption is a good consideration for a promise ; and we can take notice of an equity of redemption, and that it is a valuable thing. But suppose it were not a thing valuable, and the case were this. A. is possessed of Black Acre, to which B. has no manner of right, and A. desires B. to release him all his right to Black Acre, and promises him, in consideration thereof, to pay so much money, surely this is a good consideration and a good promise, for it puts B. to the trouble of making a release. Then where the doing a thing will be a good consideration, a promise to do that thing will be so too ; and though the want of an averment that a release was made would have been bad if demurred to, yet it is now

helped by going over and pleading. If one covenant to do several things in a certain deed agreed on, and in the end bind himself in a penalty for so doing, and debt is brought for the penalty, and shows generally that he has done nothing of what is agreed on, this would be bad on demurrer, but a plea over cures it. So if one covenant that, if J. S. do such and such things, that he will pay him so much money, J. S. brings action, and says, generally, that he performed all the things, this would be bad on demurrer, but curable by pleading over. Indeed, this being a general distinct clause seems to diversify this case from all the cases before put, where the general words, restrained by the precedent particular ones, are in the same clause with the particulars.

At another day this Term, after great consideration, the whole Court came to one resolution, which was thus delivered : —

HOLT, C. J. We all agree that the promise was not discharged by this release. It was urged at the bar by Mr. Cowper that if the plaintiff might have founded an action upon the mutual promise and agreement before any performance on his part, that certainly this release would have barred him; and the consequence is very true and necessary, if that were the case. And by the same reason, if he could not bring an action before such time as he had made a release, there is no color for the release to bar him; for till he makes the release in this case, if he has no title to the seven pounds, then till release there is no right of action; and then they do not lie in demand till release; and that a release of "all demands" will not release a thing that does not lie in demand at that time, *vide* 2 Cro. 171; 5 Co. 70, Hoe's Case. A release to bail in the King's Bench, before judgment against the principal, is not good, because till then the cause of action is uncertain, and therefore not demandable.

So the whole question will be here, Whether the plaintiff could have an action before the release? And as to that it has been urged, that in this case there were mutual promises, and the one promise is the consideration of the other, and that then he that brings the action needs not aver any performance of his side; and this likewise would be a true and necessary consequence, if the premises were true. But where the one promise is the consideration of the other, and where the performance, and not the promise, is it, is to be gathered from the words and nature of the agreement, and depends entirely thereupon; for if in this case there were a positive promise that one should release his equity of redemption, and on the other side that the other would pay seven pounds, then the one might bring his action without any averment of performance; but this agreement is not so, but that the plaintiff should release his equity of redemption, in consideration whereof the defendant was to pay him seven pounds; so that the release is the consideration, and therefore being executory is a condition precedent, which must be averred. And whereas there seems to be a variance in the books upon this learning, it will be fit on this occasion to settle it; and I agree the

case in Hob. 88 to be good law, for there is a positive agreement that one shall deliver a cow to the other, and that the other shall give him so much money, and therefore the action lies for either side without performance of his promise; but if by the agreement A. were to deliver B. a cow, and for it B. were to deliver him a horse, there the delivery of the cow would be a condition precedent, and therefore ought to be performed before A. can bring his action; and upon this diversity the books are reconcilable. 15 Hen. 7, 10, pl. 17. If A. covenant with B. to serve him for a year, and B. covenant with A. to pay him ten pounds, there A. shall maintain an action for the ten pounds before any service; but if B. had covenanted to pay ten pounds for the said service, there A. could not maintain an action for the money before the service performed. And there is great reason for this diversity; for when one promises, agrees, or covenants, to do one thing for another, there is no reason he should be obliged to do it till that thing for which he promised to do it be done; and the word "for" is a condition precedent in such cases. But upon this head some diversities are to be observed.

First. If there be a day set for the payment of money, or doing the thing which one promises, agrees, or covenants to do, for another thing, and that day happens to incur before the time the thing for which the promise, agreement, or covenant, is made, is to be performed by the tenor of the agreement; there, though the words be "that the party shall pay the money," or "do the thing for such a thing," or "in consideration of such a thing," after the day is past the other shall have an action for the money or other thing, although the thing for which the promise, agreement, or covenant was made, be not performed; for it would be repugnant there to make it a condition precedent, and therefore they are in that case left to mutual remedies, on which, by the express words of the agreement, they have depended. *Vide* 48 Edw. 3, 2, 3, cited in Ughtred's Case,¹ where the diversity is taken when there are mutual remedies and not; it is thus put in that book: Sir Richard Pool covenants with Sir Ralph Tolcelser, to serve him with three esquires in the wars of France. Sir Ralph Tolcelser covenants, in consideration of those services, to pay him so much money; and there, it is said, action will lie for the money without any services performed. But if you look into the book at large, you will find it was upon the diversity which I have taken; for the case in 48 Edw. 3, 2, 3, is, Richard Pool covenants with Ralph Tolcelser to serve him with three esquires in the wars of France, and Ralph Tolcelser covenanted with him to pay him so much money for the service; and it was further agreed that twenty marks of the money should be paid in England, at a day certain, before they went for France, and the rest by quarterly payments, which might likewise incur before the service; and upon action brought by Sir Richard Pool it was objected, that the service

¹ 7 Co. 10 b.

was not performed ; but there was no room for that objection upon the diversity which I have taken, the money by the agreement being made payable at a day certain before the service was to have been performed. 1 Vent. 147. Covenant, that in case A. would let B. enjoy land for a certain term of years, for the enjoyment he would pay him so much money before the expiration of the years. 3 Leo. 156. Covenant to pay so much money, the other making him a good estate in such lands ; held the making the estate to be a condition precedent, and therefore to be averred. 1 Saund. 319 is upon the same diversity : An agreement was to let a house to the plaintiff, with certain brewing vessels : the plaintiff covenants to pay so much money for it before Midsummer-day ; and here, because a day certain was appointed for the payment, though no assurance was made of the house, &c., yet an action lay for the money. If A. covenant to make an assurance of lands to B., who covenants to pay him ten pounds in consideration thereof, there he is not bound to pay the money before the assurance made ; but if he had covenanted to pay the money in consideration of the covenant to make the assurance, he would be liable to an action immediately.

Secondly. If there be a day for the payment of the money, or doing of other act for another, and that day is to be after the performance of the thing for which the promise, &c., was made, there, if the agreement be to pay the money, or do other thing, "for," or "in consideration," or such other words that would make a condition precedent, there such things, for the doing or performing of which the other agrees to pay the money, or do other thing, must be averred to maintain an action ; and for this Sir W. Jones, 218. The executor of A. brought an action on the case against B., declaring, that in consideration A. in his lifetime did promise to assure certain lands to B. before Michaelmas next, B. promised to pay him so much money for the land ; so the assurance was to be made before Michaelmas, and the money was to be paid for the land, and consequently after Michaelmas, for A. had time till Michaelmas to make the assurance ; and because the assurance was to have been made first, and the money by agreement to be paid for the land, though there were mutual promises, yet it was adjudged the action would not lie for the money without making the assurance first. This case, as it is there reported, is intricate, and requires consideration to make this construction upon it ; but upon examination it is a full authority in point. Dy. 76, pl. 30. A. agrees to deliver B. a hawk at Midsummer, for which he agrees to pay him a horse at Michaelmas ; there, if a hawk be not delivered at Midsummer, there shall be no horse delivered at Michaelmas, nor any remedy for it. Ughtred's case has afforded a ground for a variety of opinions upon this question ; but such as seem against these diversities laid down by me shall receive a full answer. And in 1 Roll. Abr. 414, are several cases which have been urged against me ; the first is said to have been in Michaelmas Term, in the seventh year of James the First, and it was a charter-party between A. and B., by which A. covenants to go a voyage, and take in

several loadings at several ports beyond the seas, and return with them home; B. covenants to pay A. for all that voyage 147*l.* at a day, whether after or before the voyage is left in doubt by the book; and there it was adjudged, there might have an action lain for the money without averment of performance of the voyage; and this seems an authority in point against me. But first, it does not appear there, but that the day of payment was before the voyage performed; but a full answer to it is, that there was a writ of error brought, and that judgment reversed for want of an averment. *Vide* 1 Bulst. 167. Rolle reports the judgment in the Common Pleas, in the seventh year of James the First; but it seems had not seen the reversal thereof, which was in the ninth year of James the First, two years after, as it is in Bulstrode, where it is adjudged, that *pro totâ transfretatione* is a condition precedent, and that its being in mutual covenants makes no alteration. Then there is 1 Roll. Abr. 415, said to be in Michaelmas Term, in the fifteenth year of Charles the First; and it seems also against me in point: There were articles of agreement made by A. in behalf of B. of the one part, and C. of the other part, where it was covenanted by A., that B. for consideration hereafter expressed should convey certain lands to C.; C. on his part, for the consideration aforesaid, covenanted to pay B. 166*l.*; and it was adjudged, that the assuring the land was not a condition precedent. But this case does not come up to ours; for there is an express covenant, that (for consideration hereafter expressed) B. would convey to C., and C. (upon consideration aforesaid) covenants to pay the money; and that must be forasmuch as A. hath covenanted that B. should assure lands for consideration hereafter mentioned, that is, that B. hath covenanted to pay so much money; for it is *pro consideratione prædictâ*; and the question is, What is meant by the words *pro consideratione præd.*? It is not said, "for consideration of conveyance of the land," but *pro consideratione præd.*, which must be understood in consideration of the agreement that B. should convey, &c.; for the one covenants for consideration hereafter mentioned, which must be the covenant for payment of the money, and the other covenants for consideration aforesaid, which must be that A. covenanted that B. should convey. But I must needs say, there is another home case; it was also in the time of King Charles the First, and it was on mutual promises to stand to an award between A. and B., and laid in consideration A. on his part did promise to stand to the award, B. on his part did promise to stand to it; and the award was made, that A. should pay B. 10*l.*, in consideration whereof B. should enter into an obligation to release unto A. all actions; A. brings an action against B. for not entering into the obligation according to the award; and he did aver, that he had done all on his part, but that B. had not entered into the obligation; and the exception was taken, that there was no averment of the payment of the 10*l.*, in consideration whereof he was to have entered into the bond; but it was said, there needed no averment, and this is full against me. But Rolle himself there says, the Court

were divided. And 1 Cro. 384, gives a quite contrary report of the case, and says: Jones and Berkely held it a condition precedent against Croke; so I rather believe Croke, who was one of the judges, and tells you himself was of a contrary opinion. And as to Haye's case, which is also in 1 Roll. Abr. *ubi supra*, it is reported, 1 Cro. 433, and it has no such point in it. These authorities, therefore, are well answered. There are some other scattered authorities in the books of this kind. But let us now see the reason of the thing. What is the reason that mutual promises shall bear an action without performance? One's bargain is to be performed according as he makes it. If he make a bargain, and rely on the other's covenant or promise to have what he would have done to him, it is his own fault. If the agreement be, that A. shall have the horse of B., and A. agree that B. shall have his money, they may make it so; and then there needs no averment of performance to maintain an action on either side; but if it appear by the agreement that the plain intent of either party was to have the thing to be done to him performed before his doing what he undertakes of his side, it must be then averred; as, where a man agrees to give so much money for a horse, it is plain he meant to have the horse first, and, therefore, he says the money shall be given for the horse. And it would be very dangerous to make every cursory agreement of parties to amount to mutual promises to bear an action without averment of performance; and, therefore, if two meet, and the one has a horse to sell, and the other would buy one, and they agree on the price, and then part without any earnest, or reducing the matter solemnly into writing, there, though there be no words of condition precedent, such cursory agreement ought not to be admitted as evidence of a mutual agreement; and it ought not to pass for a contract, but rather for a bare communication. *Vide* Dy. 30; Style, 32. But if there be a solemn transaction, as writing, as that A. would deliver his horse to B., and no time appointed, and that B. should pay so much money to A., there, if there be not the word "for," or other words of condition precedent, a mutual action will lie, without averment of performance; but if it be only a discourse, without the solemnity of writing, earnest, &c., it ought not to be allowed. There is a case in 2 Mod. 33. In assumpsit the plaintiff declared, that in consideration that he promised to assign to the defendant his interest in certain land, the defendant promised to pay him *proinde* so much money, and averred that he offered to assign the interest; but that matter being not well pleaded, the question was, whether it was necessary to aver performance; and held, on the reason of Ughtred's case, that it was not. And this will be a light to the reasons of *North v. Wild* [*Ware v. Chappell?*] there. *Vide* Style, 186. Covenants were between A. and B., that A. should bring 500 soldiers to such a place, by a day certain, to be transported; and that B. should attend there then with ships to transport them, and both parties failed; and the question was, Whether, though A. had brought no soldiers, B. had broke his covenant, in not being ready with ships?

And held, that B. had broke his covenant, though A. had not brought the soldiers. But this differs from our case; for there are two distinct acts to be done, one is to be ready with the soldiers, and the other with ships; and the performance of the one does not depend upon the other; the doing of the one is not the reward for the doing of the other; but they are distinct acts, and each party to do his part; there was also a day appointed. And this is not a hard case, for they are mutual acts not depending the one on the other. But in our case the money was to be paid for the release, and a vast difference. And the 7*l.* being to be paid in consideration of making the release, the words "in consideration" make a condition precedent, which, till performed, does not entitle the plaintiff to action. Then the 7*l.* were not demandable here, and consequently not dischargeable by the general release of all demands.

Another objection was, that the plaintiff had not averred a release given, or tendered by him, as he ought to have done. But here sufficient appears that it was done; for he avers performance of all that was to be done on his side; and that general averment, though informal, and besides wants time and place, for which it had been bad on demurrer, is helped by the defendant's passing it over and pleading a release, whereby he admits the plaintiff had a cause of action. And there are stronger cases than this in the books, where pleading over has helped an insufficient declaration. 3 H. 6, 8. Debt upon indentures, in which there was a penalty in which the defendant did bind himself, if he did not perform all the covenants in the said indentures; and regularly in such cases the way is, for the plaintiff to set forth the indentures, and to assign breach of one of the covenants in certain; and in debt for the penalty he said generally that the defendant had broke all the covenants in that indenture, without showing any one in certain; the defendant pleaded a collateral matter in bar, and adjudged the declaration had been bad on demurrer, but that the plea over cured it, though the breach was double and uncertain. 9 H. 6, 16, 19. And it was so adjudged in this court, in *Bernard v. Michel*.¹ But a full authority is that of *Vivian v. Shipping*:² though they agreed the money awarded was to be paid before the other was to enter into the obligation to the plaintiff, yet the plaintiff did not expressly aver payment, but generally, as here, that he had performed all on his side; and that was adjudged good after plea pleaded. So we all agree the judgment ought to be affirmed; for there was no money due to the plaintiff till release of the equity of redemption, and therefore none demandable till then, and consequently a release of all demands could not bar it.

NOTE. In this case Cowper offered this diversity in relation to mutual promises, that where the promise is of a valuable thing to the defendant, there such promise, without any performance, may be a

¹ 1 Vent. 114, 126, 2 Keb. 754, 766.

² Cro. Car. 384.

good consideration ; but where the promise is not of a thing valuable, but may be a consideration because a trouble to the party promising, there such promise, without a performance, cannot be a consideration, because such promise cannot be a trouble.

But *per* HOLT, C. J. No diversity at all ; but the cases are the same upon the learning laid down above.

LOCK v. WRIGHT.

IN THE KING'S BENCH, TRINITY TERM, 1723.

[Reported in 1 Strange, 569.]

THE plaintiff declares, that the defendant by his writing indented agreed with the plaintiff, that he (the defendant) would accept of the plaintiff 500*l.* fourth subscription so soon as the receipts should be delivered out by the company, and would pay for the same 950*l.* on the 5th of November next after the date of the writing. Then he avers, that the defendant did not pay the money at the day.

The defendant demurs generally, and Mr. *Lingard*, *pro defendente*, objected that the plaintiff had not shown the delivery of any receipts, or an impossibility of doing it, and cited, 1 Lutw. 245 ; Salk. 171.

Probyn, *contra*, answered, that there were mutual remedies, and therefore it need not be shown. 1 Saund. 319 ; 1 Lev. 274.

EYRE, J., doubted whether here was a mutual remedy, for the plaintiff does not covenant to deliver, but the other only to accept ; to which Fortescue, J., inclined. *Sed per* PRATT, C. J. The time for payment of the money is certain at all events ; but as for the delivery of the receipts, that was left uncertain, because it was impossible to fix the time for that, and if the defendant has made a foolish bargain in undertaking to pay the money on the 5th of November, whether he had the receipts or not, we cannot help him. The nature of these contracts is for the other party to give a deed obliging himself to deliver the stock, but even upon this agreement I should think the defendant would have his remedy. In the case of a deed-poll, if the lessee enters and enjoys the land, the other shall maintain debt for rent, and yet the whole is the words of the lessor.

Pasch. 8 Geo. It was argued a second time by *West*, *pro defendente*. It will not be disputed but that generally speaking the word *pro* will create a condition precedent, 1 Vent. 147 ; 2 Mod. 33 ; 1 Lev. 87 ; Salk. 112, and that it will do so in this case, if I can clear it from two objections that have been made. 1. That here is a mutual remedy ; and, 2. That here is a particular day fixed for the payment of the money.

As to the first, that is begging the question, for I take it there is not a mutual remedy, the words being the words of the defendant only, "That he will accept the subscription, and pay for the same;" which lays the plaintiff under no obligation to deliver the receipts. 1 Saund. 320.

2. As to the second objection, that here is a particular day appointed for payment of the money, I do admit, that if it appeared upon the contract that such a day must of necessity happen before the receipts could be delivered, it would then be very difficult to answer it; but that is not this case, for the company might if they pleased have given out the receipts; and that brings the case within the distinction laid down by Lord Chief Justice Holt in the case of *Thorpe v. Thorpe*, Salk. 171. Besides, it is observable that this is an entire covenant to accept and pay, so that he is not to pay till he can accept. Lutw. 490.

Reeve, contra. I admit the first part of Mr. West's argument, but insist on the two objections he has taken notice of, as sufficient to bring this case out of the reach of that general doctrine.

Here is a certain sum to be paid at a certain day, and that too before the other part of the contract could possibly be performed. The Court will take notice of the South Sea Acts, and by that of 7 Geo. Stat. 2, it appears the receipts could not be delivered by the 5th of November; so that this case falls within the first distinction of *Thorpe v. Thorpe*, that if a day be appointed for payment of the money, and that day is to happen before the thing can be performed, an action may be brought for the money before the thing be done; because it appears the party relied upon his remedy.

But then, say they, here is no mutual remedy. But I take it that, this being an agreement by indenture, the Court will intend it was executed by both parties. As to the cases, they are all of parol agreements, where a consideration must appear to make it a binding promise; but here the action will be maintainable on the bare covenant to pay, without any consideration at all, and therefore the *pro*, &c., may be left out.

ADJOURNATUR. And this Term PRATT, C. J., delivered the resolution of the Court.

This is an action upon a deed-poll made by the defendant, and whereby he covenants to accept so much stock, and to pay for the same; and the plaintiff in an action for the money has not averred a delivery or tender of the stock, and for this fault we are all of opinion the declaration is not good.

The intent of the parties appears to be, that one should have the money, and the other the stock; and not that either should perform his part of the agreement, and lay himself at the mercy of the other for the equivalent. This is not a covenant entered into by both parties, upon which each will have his mutual remedy; but it is the deed-poll of the defendant only; and therefore, though upon delivery or tender of the stock the plaintiff will have his remedy for the money, yet the defendant on the other side, upon payment of the money, will have no

remedy to compel the delivery of the stock; and having no such remedy he shall not be obliged to pay the money till the consideration for which it is payable is performed.

The word *pro* will be either a condition precedent or subsequent, as will best answer the intent of the parties: in this case it must be a condition precedent, because otherwise the intention of the defendant to have the stock for his money can never take effect; and this is proved by 7 Co. 10, and 1 Inst. 204, where the annuity *pro una acra*, says the book, supposes the acre to be first granted.

The case of Callonel v. Briggs (Salk. 112) was not so strong, for there was a promise to transfer, which gave a mutual remedy, but yet Holt, C. J., held the plaintiff to show a tender, because that was the consideration for the defendant's payment of the money. And the case he there puts, of the sale of a horse for 10*l.*, is exactly the same with this.

The resolutions that were mentioned at the bar of the case of Thorpe v. Thorpe, are all founded on great reason; and the first of them is agreeable to the resolution of this case, which is an executory contract, where one is to do the act, and for the doing thereof the other is to pay.

And this difference between a mutual covenant and a deed-poll is likewise taken and allowed in the case of Pordage v. Cole, 1 Saund. 320, where the Court were of opinion the defendant had his remedy, "otherwise (says the book) it would have been, if the deed had been the words of the defendant only," which is this case.

For these reasons we are all of opinion the defendant must have judgment.

JOHN THOMAS v. MARGARET CADWALLADER, *Administratrix* of CHARLES CADWALLADER.

IN THE COMMON PLEAS, NOVEMBER 24, 1744.

[Reported in Willes, 496.]

COVENANT. The plaintiff declares upon an indenture dated 10th of February, 1720, whereby the plaintiff and one Rebecca Thomas, since deceased, demised to Charles Cadwallader a messuage and tenement in Bishop's Castle with the stable, mill, garden, and backside or yard thereto belonging (except as therein excepted), to hold the same from the 25th of March then next for twenty-one years under the rent of 10*l.* a year, payable at Michaelmas and Lady-day. And the said Charles did thereby covenant for himself, his executors, administrators, and assigns, to and with the said John Thomas, his heirs and assigns, that he, the said Charles, his executors, administrators, and assigns, should and would,

from time to time and at all times during the said term, uphold, maintain, repair, and keep the said messuage and other the demised buildings thereto belonging in good and sufficient repair, and the same, at the end or sooner determination of the said term, should and would surrender and yield up to the said John and Rebecca, their heirs and assigns, in good and tenantable order and repair, he, the said John, his heirs and assigns, finding, allowing, and assigning timber sufficient for such reparations during the said term, to be cut and carried by the said Charles, his executors, administrators, and assigns.

And the plaintiff sets forth that Charles entered by virtue of the said indenture, and being possessed of the said demised premises, died at Ludlow, on the 22d of April, 1735; and that administration of all his goods, &c., with his will annexed, was afterwards duly granted to the defendant, who by virtue thereof entered upon the demised premises, and was possessed thereof until the end of the said term, and that at the end of the said term of twenty-one years, and for the space of five years then before, the said messuage and other the demised buildings thereto belonging were greatly ruinous and in decay, and wanted necessary reparations and amendments; and that the defendant during her possession of the said messuage, &c., did not uphold, maintain, repair, and keep the same in good and sufficient repair, and the same at the end of the said term surrender and yield up in good and sufficient order and reparation, but at the end of the said term left the same so in decay, and wanting great reparations as aforesaid; contrary to the form and effect of the said covenant, &c.; and lays his damage at 100*l*.

The defendant pleads that the plaintiff during the said term did not find, allow, or assign timber sufficient for upholding, repairing, maintaining, or keeping the said messuage and other the said demised premises in good and sufficient repair; to which the plaintiff demurs generally, and the defendant joins in demurrer.

And upon this it came in judgment before the Court.

Bootle, Serjt., for the plaintiff, insisted on three things:—

1. That the plea was too general; it only saying that the plaintiff during the term did not find, &c.

2. That the finding of timber by the plaintiff was not a condition precedent, but a mutual or reciprocal covenant; and consequently that the breach of it cannot be pleaded to an action brought on the covenant of the lessee.

3. That if it could be insisted on by way of plea, yet that a request ought to have been pleaded.

And he cited the case of *Warren v. Asters*, Sir Tho. Jon. 206, where the lessor covenanted that the lessee should have liberty to cut trees for repairing,¹ he making good the fences and ditches, and it was holden

¹ This case is not accurately stated. It was an action of trespass by a lessee for years; to which the defendant pleaded that Martin, who had leased to the plaintiff, excepted the trees with liberty to cut and carry them away, he mending the fences and filling up the pits, and that Martin afterwards granted the trees and the liberty

not to be a condition, but a mutual covenant. That the word "paying" has been held to be a covenant and not a condition.¹ And he cited a case in B. R., reported in Lucas,² 153, 189, and 222, where it was held that, if a man covenanted to pay money due on a judgment to a person, he assigning the judgment, in an action of covenant brought for non-payment of the money, the defendant could not insist that the plaintiff had not assigned the judgment, it being a mutual covenant and not a condition precedent. He cited likewise 3 Lev. 41; the case of *Portage v. Cole*, 1 Saund. 319; and 1 Rol. Abr. 518, the case of *Holder v. Taylor*; to show that these words in the present case are not to be considered as a condition, but as a mutual covenant. But in the case cited out of Rolle, the words are plainly words of covenant; and it is there said that if the words had been that the lessee should repair, provided the lessor find him great timber for it, they would not have been considered as a covenant on the part of the lessor, but as a qualification of the covenant of the lessee; so that this case is rather an authority against the plaintiff.

He insisted likewise that if this were necessary to be done by the plaintiff, yet that the first act was to be done by the lessee; for that he was to request the plaintiff to find the timber; and that he ought likewise to show that these were such repairs for which timber was necessary, for which purpose he cited 1 Rol. Abr. 465. pl. 28.³

Hayward, Serjt., for the defendant, did not much insist that the plea was good, but said that the declaration was bad; and that then it was immaterial whether the plea were good or not. He said that these could not be considered as mutual covenants, for that the finding of timber was a condition precedent, or the qualification of the lessee's covenant. That *ipso faciente* and *si ipse fecerit* have exactly the same meaning; and that if the words had been *si ipse invenerit*, it had undoubtedly been a condition precedent. That the breach therefore is not assigned upon the covenant in the deed; for the covenant to repair is a qualified covenant, and *sub modo*, and the breach is assigned of an absolute covenant to repair. He cited the case of *Large v. Cheshire*, 1 Ventr. 147; 1 Rol. Abr. 414; and 2 Danvers, 229, title "Covenant," (C), ss. 2 and 3, where it is holden that though the word "agreed" makes a covenant, yet that "provided always" makes no covenant, but is a condition precedent. And he put the case that a man should covenant with A. to go to York, A. finding him a horse for that purpose;

to the defendant; and then he justified under this liberty, &c. The plaintiff demurred, and showed for cause that the defendant had not alleged that he had mended the fences and filled up the pits; but it was not allowed, because it was not a condition, but a covenant for which the lessee had a remedy by action.

¹ The case of Sir George Bickerstaffe, cited *ib.*

² 10 Modern.

³ *Holder v. Taylor*. "If a man lease a mill for years, and the lessee covenant to repair the mill, and the lessor covenant to find him great timber for it, the lessee ought to give notice to the lessor how much will suffice for the reparation, and not demand in general timber for reparation; otherwise the lessor is not bound to deliver any." — Ed.

where it was plain that the covenantor was not obliged to go to York unless A. provided him a horse; which case (he said) was exactly parallel with the present. He therefore insisted that the plaintiff ought to have set forth in his declaration that he was always ready to find and assign him timber, and that not having done so the declaration was insufficient.

We were all of that opinion, and gave no opinion upon the plea.

I thought that none of the cases, though in my opinion they had gone too far already, came up to the present case, for that this finding of timber was a thing in its nature necessary to be done first, and therefore must be considered as a qualification of the lessee's covenant. When two covenants in a deed have no relation to each other, I was clearly of opinion that the non-performance of one could not be pleaded in bar to an action brought for the breach of another covenant in the same deed; and for this plain reason amongst others that the damages sustained by the breach of one such covenant may not be at all adequate to the damages sustained by the breach of the other; and therefore I held that all the cases were right where nothing more was determined. The case of assigning the judgment is plainly different; for a man may pay the money before the judgment is assigned. The case of paying rent is also different, because a man may enjoy the land, nay, ought to enjoy it, before he pays rent. The case of repairing the hedges and fences likewise stands on the same reason; for there the wood must be cut down before the hedges and ditches are mended. But a man cannot repair until the timber is assigned him for such repairs. And the case in 1 Rol. Abr. 518, and that in Danvers, 229, are strong authorities for the defendant; for the word "provided," which was there holden to make a condition, is not so strong an expression as the words "finding and allowing" in the present case. But I expressed my dislike of those cases, though they are too many to be now overruled, where it is determined that the breach of one covenant, though plainly relative to the other, cannot be pleaded in bar to an action brought for the breach of the other, but the other party must be left to bring his action for the breach of the other; as where there are two covenants in a deed, the one for repairing and the other for finding timber for the reparations; this notion plainly tending to make two actions instead of one, and to a circuity of action and multiplying actions, both which the law so much abhors. If therefore this were a new point, I should be inclined to be of opinion that, though, where there are mutual covenants relative to one another in the same deed, a plaintiff is not obliged, in an action brought for the breach of them, to aver the performance of the covenant which is to be performed on his part, yet that the defendant in such action may in his plea insist on the non-performance of the covenant to be performed on the part of the plaintiff; but this has been so often determined otherwise, that it is too late now to alter the law in this respect. But where words make a condition precedent or a qualification of a covenant, as the present case plainly is, all the cases agree that the

plaintiff in his declaration must aver the performance of such condition or qualification.

And my brothers Abney and Burnett being both of the same opinion with me,
Judgment was given for the defendant.

COLLINS v. GIBBS.

IN THE KING'S BENCH, NOVEMBER 27, 1759.

[*Reported in 2 Burrow, 899.*]

MR. BURLAND had moved on Thursday last in arrest of judgment, after a judgment by default and a writ of inquiry executed, in an action upon the case on assumpsit.

His objection was the want of an averment of performance of what he insisted to be a condition precedent.

The question was, whether it was a condition precedent or not.

It was an action upon the case wherein the plaintiff, having first recited the dependency of a former action brought by the defendant against him, and a compromise thereof, upon an agreement for the payment of the costs of it by the present defendant to the present plaintiff, on the now plaintiff's giving him a general release, lays the defendant's promise to pay him his demand in the present action to have been made, "in consideration that the said William (the now plaintiff), at the special instance and request of the said John (the now defendant), would execute to the said John a general release, to bear date on the twenty-seventh day of July in the year aforesaid" (which was the day before the agreement), "and to be filled up in the common and usual form of general releases, he, the said John (the present defendant), undertook and faithfully promised the said William (the present plaintiff) to pay him all the costs and expenses that he, the said William, had been at in defending the said suit, fees of counsel, subpoenaing witnesses, journeys, and all other charges and demands in the said suit whatsoever, as soon as a bill of such costs could be prepared and produced to him, the said John."

Then the plaintiff avers his costs and expenses in the said suit to have been 21*l.* 3*s.* 7*d.*; and that a bill of such costs and expenses was prepared, and produced to the defendant; whereof he had notice. But the said defendant, &c.

Mr. *Burland* urged that the plaintiff ought to have averred "that he had given or tendered to the defendant a general release executed." For that his giving such a release appeared to be a condition precedent; the defendant's promise being made in consideration that he would do so. In proof of which he cited *Hobart*, 106; 1 *Ld. Raym.* 662, *Thorpe v. Thorpe*.

Mr. *Dunning*, contra, cited 1 Salk. 29, *Roe v. Haugh* in Cam. Scac., where the judges held that they ought to do what they could to help the declaration (which case he acknowledged to be after a verdict).

Mr. *Burland* replied that that was after a verdict. This is only after a judgment by default.

The release would be no bar to the demand in the present case; because it is agreed that it should bear date the day before the agreement. So that the cause of action was subsequent to it, and therefore could not be barred by it.

The plaintiff made no promise to execute the release. Therefore, we have no other method to oblige him to it. The payment of the money is to be on his executing it.

LORD MANSFIELD. The release is to be given "at the special instance and request of John" (the now defendant). But perhaps he may never request it. We will see if it can be made good by construction.
Cur. adv. vult.

LORD MANSFIELD now delivered the resolution of the Court.

This is a motion made by the defendant in arrest of a judgment by default; so that it comes before the Court exactly as if it had been upon demurrer, and is not like the cases of objections to judgments after verdict.

The plaintiff has not averred performance of what was to be done on his part, nor shown that he was ready to perform it.

Therefore, we are all of opinion that it cannot be made good, as laid in the declaration; and the true distinction as to supplying such defects is, whether the objection be made after a verdict or not.

Therefore, the judgment must be arrested.

Whereupon Mr. *Dunning* moved to amend, upon payment of costs, by inserting such an averment, as (he said) the fact really was; which was opposed by Mr. *Burland*, as being too late after judgment was arrested, and as having never been done.

LORD MANSFIELD. As it is doubtful whether this can be done or not; and as it is certain that the difference between paying costs to amend, and beginning afresh, is very trifling in this case, it is better to let the rule be as it was pronounced; and, accordingly, let the judgment be arrested.
Per Cur. Judgment arrested.

THE DUKE OF ST. ALBANS *v.* SHORE.

IN THE COMMON PLEAS, JUNE 29, 1789.

*[Reported in 1 Henry Blackstone, 270.]*DEBT for 500*l.*, the penalty of articles of agreement.

The declaration stated the agreement to have been made between the plaintiff and defendant on the 30th of March, 1787, by which the defendant was to purchase of the plaintiff a certain farm with the appurtenances, together with an acre and half of boggy land, at the price of 2,594*l.*, which was to be paid at Lady-day then next in the following manner: the plaintiff was to accept of a conveyance and surrender of certain copyhold and leasehold premises of the defendant, at the price of 1,820*l.* (to be deducted from the before-mentioned sum of 2,594*l.*), the defendant to convey those premises at the expense of the plaintiff unless a fine should be necessary, the expense of which the defendant was to pay; and the plaintiff to make a good title to the defendant at his (the defendant's) expense, unless a fine or recovery should be necessary, for which the plaintiff was to pay, who, on executing the conveyances, was to receive the rest of the purchase-money. All timber-trees, elms, and willow-trees, which then were upon any of the above estates, to be fairly valued by two appraisers, and the prices or values thereof to be paid by the respective purchasers of the estates at the time before mentioned; the rents of the respective estates to be received by the owners till the 24th of March then next. It was also agreed that, in case the plaintiff should not be enabled to make a good title to the said estate before the said 24th of March, that agreement should be void. And although the plaintiff had done and performed every thing on his part, &c., yet, protesting that the defendant had not done any thing on his part, &c., "in fact, the said duke saith, that he the said duke always from the time of the making of the said articles of agreement, until and upon the said twenty-fourth day of March next ensuing the date thereof, and always since hath been, and is, capable, ready, and willing to make a good title to the said William Shore of the said farm and premises, and boggy land so agreed to be purchased by the said William Shore as aforesaid, and to execute and cause to be executed necessary and proper conveyances and assurances of the said farm and premises, and boggy lands, to the said William Shore, if the said William Shore would have drawn and prepared the same for execution, according to the form and effect of the said articles of agreement, to wit, at Hanworth aforesaid: And the said duke avers that he the said duke, before the twenty-fifth day of March, being Lady-day, 1788, to wit, on the twenty-second day of March, A. D. 1788, at Hanworth aforesaid, gave notice to the said William Shore, that he the said duke was ready and willing at any time to make a good title

to the said William Shore of the said farm and premises and land, so agreed to be purchased by the said William Shore, and to execute and cause to be executed proper deeds, conveyances, and assurances for that purpose, if the said William Shore would prepare the same, he the said duke then and there being, and still being, enabled to make, and capable of making, a good title to the said William Shore of the said farm and premises and land, according to the form and effect of the said articles: yet the said William Shore did not, nor would, on or before the said twenty-fourth day of March next ensuing the date of the said articles of agreement, nor hath he at any time hitherto, drawn or prepared, or caused to be drawn or prepared to be executed any deed, conveyance, or assurance whatsoever, of the said farm and premises and lands mentioned in the said articles of agreement, and so agreed to be purchased by the said William Shore as aforesaid, nor did, nor would pay the said purchase-money or any part thereof, nor did, nor would accept the said title according to the said articles of agreement; but, on the contrary thereof, the said William Shore hath wholly neglected and refused, and still doth neglect and refuse, to draw or prepare any deed, conveyance, or assurance of the said farm, premises, and land, unto the said William Shore, or to pay the said purchase-money or any part thereof, or in any wise to carry the said articles into execution, contrary," &c.

Plea: "That the said duke was not capable, ready, and willing to make, nor could he, the said duke, make a good title to the said William of the said farm so agreed to be purchased, according to the tenor and effect of the said agreement, &c. And for further plea, &c., that after the making of the said agreement, and before Lady-day then next following, to wit, on the twentieth of March, A.D. 1788, the said duke cut down divers, to wit, 500 of the said timber trees, 500 of the said elms, and 500 of the said willow-trees, in the said declaration and agreement respectively mentioned, and by the said agreement agreed to be valued and paid for as in the said agreement is mentioned, whereby the said duke disabled himself from performing, and it became, and was impossible, for him to perform and fulfil the said articles of agreement, on his part, &c.; for which reason he, the said William, declined and refused to carry the said articles into execution on his part, as he lawfully might," &c.

Replication: Issue on the first plea, and general demurrer to the second. Joinder in demurrer.

This was argued in Hilary Term last, by *Lawrence*, Serjt., for the plaintiff, and *Bond*, Serjt., for the defendant, and a second time in Easter Term, by *Le Blanc*, Serjt., for the plaintiff, and *Marshall*, Serjt., for the defendant.

The arguments in support of the demurrer were in substance as follow:—

The articles of agreement in this case divide themselves into two branches. First, that the defendant was to purchase of the plaintiff a

farm, &c., for 2594*l.*, in part of payment for which the plaintiff was to accept a conveyance of other premises. Secondly, that the trees growing upon any of the estates should be valued and paid for by the respective purchasers. The object of the plea is to show that the plaintiff, having cut down trees on his estate, was incapable of performing his part of the agreement, and, therefore, that the defendant was not bound to perform the other part. In order to support the plea, it must be proved that the matter contained in it was a precedent condition; for if it were not such a condition, the non-performance of it cannot be pleaded in bar. Where one part of an agreement is not the consideration of the other, non-performance of one part cannot be pleaded as an excuse for the non-performance of the other. In this case, the agreement respecting the trees was no part of the consideration of the act which the defendant was to perform, namely, to convey his estate, and pay the residue of the purchase-money. Where there are mutual remedies, it would be unjust that the breach of one covenant should be alleged as a reason for the breach of another, because the damages arising from the one might be unequal to those occasioned by the other. The case of *Boone v. Eyre* was similar to the present: there the covenant was for well and truly performing, &c., the breach was non-payment, and the plea in bar, that the plaintiff was not legally possessed of the negroes on the plantation. There Lord Mansfield said, if the plea were allowed, any one negro not being the property of the plaintiff would bar the action. So here, if this plea were allowed, any one tree being cut down would be a bar to the plaintiff's demand. In *Hunlocke v. Blacklowe*, 2 Saund. 155, the terms of the agreement were as strong as the present, but there a similar plea was not allowed. To the same effect, also, is *Cole v. Shallett*, 3 Lev. 41. Though these were actions of covenant, yet the statute of 8 & 9 Will. III., c. 11, has put actions of covenant and debt for a penalty on nearly the same footing, as in neither more than the real damages sustained can be recovered.

On the part of the defendant, three objections were made to the declaration: 1st. That the plaintiff had not shown a sufficient performance of his part of the agreement to entitle him to bring an action for the penalty. The conditions in this case seem to be what Lord Mansfield calls "dependent conditions," in which the performance of one depends on the prior performance of the other; and, therefore, till the prior condition be performed, the other party is not liable to an action for the non-performance of his part. Dougl. 691. It is not enough for the plaintiff to aver that he is ready and willing to perform his part; the defendant is not obliged to convey his estate to the plaintiff before the plaintiff conveys to him. Even in covenant to recover damages for the non-performance of this agreement, the plaintiff must have shown that he had actually done all in his power to perform his part; but this being debt for the penalty, an action of a more harsh nature, the plaintiff must show a precise performance;

which is made a condition precedent. A court of equity, on the same principle, will not decree a specific performance of an agreement, unless the party applying for the decree has exactly performed his part. Wherever performance is necessary to be averred, it must be shown with such certainty that the Court may judge whether the intent of the covenant be performed. 5 Com. Dig. 43. To make a good title means to convey by a good title; and he who is bound to convey is bound to prepare and tender such conveyances as are proper to make a good title to the grantee. 1 Roll. Abr. 465, l. 3; 2 Lev. 95; 1 Ventr. 255; 1 Mod. 104. If it be said that the defendant must prepare the conveyances, because he is to pay the expense of them, the answer is that the law is otherwise. If nothing be said of the expense, it shall be defrayed by the grantor. 1 Roll. Abr. 422, l. 50. But where the grantee is to pay the costs, yet the grantor must prepare the conveyances. Cro. Eliz. 517. If he be bound to assure at the charge of the grantee, he must give notice what sort of conveyance he will make. Halling's Case, 5 Co. 22 b. In the present case, as neither party has done any act towards conveying their respective estates, neither can bring an action for the penalty. But if it should be holden that the defendant was bound to prepare the conveyances because he was to pay the expense, yet the plaintiff has not shown a sufficient performance, since, for any thing that appears, a fine might be necessary: and as such fine was to be at the expense of the plaintiff, and he was bound to levy it if necessary, he ought to have shown either that he had levied it or that it was not necessary. But supposing the defendant was bound to prepare the conveyance from the plaintiff, then must the plaintiff be bound to prepare the conveyance from the defendant. If so, the plaintiff ought to have stated, not only that he had offered to make a good title to the defendant, but also that he had prepared a conveyance from the defendant to him, had tendered it to the defendant to be executed, and demanded the difference in value; but that the defendant had neither prepared a conveyance from the plaintiff to him, executed the conveyance from him to the plaintiff, nor paid the difference.

The second objection to the declaration is, that the plaintiff only states that he was ready and willing to make a good title, but does not show what title. If he in fact had no title, or could not make one to the defendant, the agreement was void by the terms of it, and it would be impossible for him to recover; this title is therefore an essential part of the case. But the validity of the title is a matter for the cognizance of the Court, and therefore it must appear on the record, that the Court may judge of it, and the defendant take issue on any of the facts which support it, if untrue, or demur if it be insufficient. Here the performance is stated so generally, that no precise issue can be taken on it. In covenant, the breach may be assigned as large as the covenant, because damages only are to be recovered; but in debt for a penalty a precise breach must be shown, because a breach is a forfeiture of the whole bond. 1 Ld. Raym. 107. No issue can be

taken on the word "patron" or "heir." 1 Ld. Raym. 202. But the word "title" is of much more vague signification than either "patron" or "heir." Where any thing is to be done as a precedent condition, an averment that the party was ready and willing to do it is insufficient; neither is an averment *paratus fuit* and *obtulit* sufficient, unless he states that he was hindered by the other party, 2 Saund. 350; 1 Roll. Abr. 465, l. 40: but *paratus fuit* and *obtulit* is sufficient where nothing is to be done on his part before the other has done a prior act. *Ibid.* The plaintiff, therefore, ought here to have shown that he had actually made a good title to the defendant, and what that title was. Hob. 69, 77; Cro. Jac. 315, 425, 503; Cro. Eliz. 919; Yelv. 49; Sid. 467; Doug. 620.

The third objection to the declaration is, that there are three breaches assigned in an action of debt, but it is not stated to be according to the form of the statute; for as before the Stat. 8 & 9 W. III., c. 11, only one breach could be assigned in an action of debt, if many be now assigned, notice must be taken of the statute in pleading. But the breaches themselves do not meet the covenant, not being breaches of the contract stated. They are: 1st. That the defendant did not draw or prepare any conveyance. 2d. That he did not pay the purchase-money. 3d. That he would not accept the title. Now a breach should be assigned in the words of the covenant; or at least it must contain the plain and obvious meaning of the covenant. But it has been proved that the defendant was not bound to prepare the conveyance. The agreement also was that he should satisfy the plaintiff, partly by conveying certain premises to him, and by paying him the remainder in money, not that he should pay the whole in money. This breach, therefore, ought to have been, that the defendant did not convey to the plaintiff the premises which he agreed to convey, nor pay the difference. As to the third breach, it would have been proper if the plaintiff had shown a sufficient performance on his part; but the defendant could not accept till the plaintiff had actually executed the conveyances.

With respect to the plea, it is to be observed that the agreement is not in two parts; the clause relating to the trees is not a new contract of sale, but the mode of valuation. It was understood that they were to go with the land. They were to be paid for by the respective purchasers; that is, by the purchasers of the land on which they grew, and were considered as part of the purchase. The value of land with timber growing on it can only be fairly estimated by an appraisement of the timber. But a grant of land passes all woods and timber growing on it; Co. Lit. 4 a; the appraisement is only to ascertain the value. Small timber growing is of great value, which if cut would be worth nothing. Thriving timber will pay 10 or 15 per cent. for the purchase-money, and without it the land may be of no value. If there be a covenant to leave all timber on the land, it is a breach for the party to cut them down, though he leave them. Sir Tho. Raym. 464. If the

plaintiff has cut down any of the trees, he is not entitled to the penalty, because he has deprived the estate of certain qualities which were an inducement to the defendant to contract. Admitting the authority of *Boone v. Eyre*, it is not applicable to the present case; there the value of the plantation was not altered by the loss of some of the negroes. No case has been adduced where the subject-matter of the contract was changed. This is one entire contract. The sale of the land is the sale of the timber. The defendant is called upon to pay for a thing different from that for which he agreed. Various cases might be put where there may be an agreement for the purchase of one entire thing, and a particular mode of valuing a part of it.

It was replied,

That although it was objected that the plaintiff had not shown a sufficient performance on his part, yet he had stated that he was capable, ready, and willing to make a good title, and of which he had given notice to the defendant. This was sufficient. The plaintiff was not bound to execute the conveyances, unless the defendant had drawn and paid for them. As to the cases cited, where it was holden insufficient to state that the party was ready and willing to perform his part, there some specific, certain act was to be done; in which case, performance was necessary to be averred. But here the plaintiff was to make no conveyance without the consent of the defendant. The first class of cases only shows at whose expense conveyances were to be made, where there was no express agreement; but here, by the covenant, the defendant was to pay it. As to the objection that a fine might have been necessary, that is answered by stating that the plaintiff gave notice to the defendant that he was ready and willing at any time to make a good title. If a fine were necessary, the defendant ought to show that it was necessary; the plaintiff agreed to levy it only if it were necessary. As to the case where the word "*patron*" was not sufficiently certain to take issue upon, it was in *quare impedit*, where the party was obliged to make out a title to himself, and show an actual presentation. In the other class of cases cited, where the words "*ready and willing*" were holden not sufficient, an absolute performance was necessary to be stated, because it was wholly in the power of the party to perform the act required. But where two things are to be done at the same time by different parties, it is enough for the party declaring to state that he was ready and willing to perform his part; especially where money is to be paid for the conveyance of an estate, in which case the party to whom the estate is to be conveyed is not forced to pay, unless the other is ready and willing to convey. The ground of the decision in *Cro. Jac.* 315, was, that the plaintiff ought to have shown by what title the plaintiff in ejectment recovered, since it might have been by his own conveyance, and then, though the facts alleged were true, still there might be no breach of covenant. On this principle the case of *Noble v. King*¹ was decided in this court. So, also, in the other cases

¹ 1 H. Bl. 34.

cited, where there were covenants for good title and quiet enjoyment, it was necessary to state the title of those by whom the parties were evicted or disturbed, because the facts alleged might be true, and yet the covenants might not be broken. The case cited from Yelverton, 49, was decided principally on the ground that the declaration ought to have shown that B., the person who was to become bound according to the agreement, was in fact bound.

As to the third objection to the declaration, namely, that the breaches are not stated to be assigned by virtue of the statute; that is matter of form, and not to be taken advantage of on a general demurrer. As to the objection that they are not breaches of the agreement stated, it is to be observed that they are in substance and truth breaches of the agreement. It sufficiently appears from them, that the defendant did not do what he was bound to do, that he neither prepared the conveyances, paid the purchase-money, or accepted the title of the plaintiff. He ought by some act on his part to have enabled the plaintiff to have done what he had agreed to do, namely, to convey, &c. No answer has been given to the case of *Boone v. Eyre*, where the negroes were to pass with the land, as the trees in this case. There the damages for the loss of the negroes were unequal to those which would have accrued to the other party. There also a gross sum was stipulated for the negroes, together with the plantation; here, there was only an agreement for a valuation. If any tree had been cut down, the defendant would have paid so much the less; and if there was any ideal value annexed to the growing timber, he ought to have stated it. The whole contract is not to be rescinded by an alteration in the trees on the land, which were to be the subject of a separate valuation.

Cur. adv. vult.

On this day the following judgment of the Court was delivered by LORD LOUGHBOROUGH, who, having stated the pleadings, said:—

It is clear in this case, that unless the plaintiff has done all that was incumbent on him to do, in order to create a performance by the defendant (if I may use the expression), he is not entitled to maintain the action. If he has not set forth a sufficient title, judgment must be against him whatever the plea is, and if the plea be a good bar, the same consequence must follow. It was argued on the part of the plaintiff, that the agreement respecting the trees was not a condition precedent, and therefore a breach of that agreement could not be pleaded in bar of the action. In support of this argument, the case of *Boone v. Eyre* was cited; but in that case, though the Court of King's Bench held the plea insufficient, yet they laid down a clear and well founded distinction, that where a covenant went to the whole of the consideration on both sides, there it was a condition precedent; but where it did not go to the whole, but only to a part, there it was not a condition precedent, and each party must resort to his separate remedy; and for this plain and obvious reason, because the damages might be unequal. The

cases also of *Hunlocke v. Blacklowe*, 2 Saund. 155, and *Cole v. Shallett*, 3 Lev. 41, were cited as being in favor of the plaintiff. But it is unnecessary to enter into the discussion of those cases, though perhaps doubts may reasonably be entertained of the doctrine laid down in *Saunders*, and though the case cited by him in his argument may deserve full as much consideration as that which was the subject of the determination of the Court. For we found our opinion in the present case on the ground of the distinction in *Boone v. Eyre*, which we think a fair and sound one. Then the question is, Whether the covenant of the plaintiff goes to the whole consideration of that which was to be done by the defendant? Now the duke clearly covenanted to convey an estate to the defendant, in which all the timber growing on the estate was necessarily included. The timber was not disjoined from the estate by the separate valuation of it. It was expressly agreed that all trees, &c., which then were upon any of the estates should be valued. But it is not to be permitted to a party contracting to convey land, which includes the timber, by his own act to change the nature of it between the time of entering into the contract and that of performing it. There may be cases where the timber growing on an estate is the chief inducement to a purchase of that estate. But it is not necessary to inquire whether it be the chief inducement to a purchase or not; for if it may be in any sort a consideration to the party purchasing to have the timber, the party selling ought not to be permitted to alter the estate by cutting down any of it. This is not an action of covenant where one party has performed his part, but is brought for a penalty, on the other party refusing to execute a contract. But to entitle the party bringing the action to a penalty, he ought punctually, exactly, and literally to complete his part. We are therefore of opinion that the plea is a good bar to the action, and on this we give our judgment. My brother Marshall made some exceptions to the declaration, which it is not necessary to go into, but which, speaking for myself, I think material. It is to be observed, that this is not a contract absolutely and at all events to convey, Where a man undertakes to convey, he undertakes to convey by a good title. There are cases where a court of equity has holden that a party so undertaking might make a title by procuring an act of Parliament, and that he was bound to purchase in all outstanding terms to make a good title. But in this case, if the plaintiff was not enabled to make a good title before a certain day, the agreement was to be at an end, he might be off and was released from his engagement. He therefore undertook to make a good title before a given time; the breach assigned is, that the defendant refused to accept the title. But what title? What exhibition of title? What title was tendered to him? What was there for him to accept? This, perhaps, is rather *dehors* the question, though it might be material if it were necessary to take it into consideration. But the ground of our determination is, that the plea is good, as I before stated, within the distinction laid down by the Court of King's Bench in the case of *Boone v. Eyre*.

Judgment for the defendant.

WORSLEY v. WOOD AND OTHERS, *Assignees of LOCKYER AND BREAM, Bankrupts*; IN ERROR.

IN THE KING'S BENCH, JUNE 7, 1796.

[Reported in 6 Term Reports, 710.]

THIS was an action of covenant brought in the Court of Common Pleas.¹ The declaration stated that by a policy of insurance made before Lockyer and Bream became bankrupts, namely, on the 9th of March, 1792, it was witnessed that Lockyer and Bream had paid 11*l.* 16*s.* to the Phoenix Company, and had agreed to pay to them, at their office, the sum of 11*l.* 16*s.* on the 25th of March, 1793, and the like sum yearly on the said day during the continuance of the policy for insurance from loss or damage by fire, not exceeding the sum of 7,000*l.* That Worsley covenanted with L. and B. that, so long as the assured should pay the above premium, the capital stock and funds of the Phoenix Company should be liable to pay to the assured any loss that the assured should suffer by fire on the property therein mentioned, not exceeding 7,000*l.*, according to the tenor of the printed proposals delivered with the policy. That in the printed proposals referred to by the policy it is declared that the company would not be accountable for any loss by fire caused by foreign invasions, civil commotion, &c.; and also that all persons assured sustaining any loss by fire should forthwith give notice to the company, and as soon as possible after deliver in as particular an account of their loss as the nature of the case would admit, and make proof of the same by their oath and by their book of accounts, or other vouchers as should be reasonably required, and should procure a certificate under the hands of the minister and churchwardens and of some reputable householders of the parish, not concerned in the loss, importing that they were acquainted with the character and circumstances of the person insured, and knew or believed that he by misfortune and without any kind of fraud or evil practice had sustained by such fire the loss and damage therein mentioned; and in case any difference should arise between the assured and the company touching any loss, such difference should be submitted to the judgment of arbitrators indifferently chosen, whose award should be conclusive, &c., and when any loss should have been duly proved, the assured should immediately receive satisfaction to the full amount of the same. The declaration then stated that on the 1st of July, 1792, a loss happened by fire in the house of L. and B., in which all their books of accounts were destroyed, to the amount of 7,000*l.* That L. and B. on the same day gave notice of it to the company, and on the same day delivered to the company as particular an account of their

¹ See 2 H. Bl. 574. — ED.

loss as the nature of the case admitted, and were then and there also ready and willing and then and there tendered to make proof of the loss by their oath, and to produce such vouchers as could be reasonably required in that behalf; that on the same day they procured and delivered to the said company a certificate under the hands of four reputable householders of the parish, to the effect required in the printed proposals, and applied to E. Embry, the minister, and H. Hutchins and J. Bellamy, the churchwardens of the parish, to sign such certificate, but that they, without any reasonable or probable cause, wrongfully and unjustly refused and have ever since refused to sign it. The declaration then stated that the funds of the company were sufficient to pay this loss, yet the company have not paid it, either to the bankrupts or to their assignees; nor have the company submitted the said difference to the judgment of such arbitrators, &c.

There was another count, in which it was not averred that the bankrupts either offered to make proof of the loss, or procured a certificate, or applied to the minister, &c., for one; and the breach in this count was, that the company had not submitted the said difference to the judgment of such arbitrators, &c.

The defendant pleaded (to the first count) that the bankrupts were not interested in the house or goods, &c., at the time of the loss, on which issue was taken in the replication. 2d. That the loss was occasioned by the fraud and evil practice of the bankrupts; on which issue was taken, &c. 3d. That the minister and churchwardens did not refuse wrongfully and injuriously, and without any reasonable or probable cause, to sign the certificate; on which issue was taken. To the second count. 1st. That the bankrupts were not interested, &c.; on which issue was taken. 2d. That the loss was occasioned by fraud, &c. (as above); on which issue was taken. 3d. That neither the bankrupts or their assignees procured such certificate under the hands of the minister and churchwardens and respectable inhabitants, &c., as required in the printed proposals.

To the last of these pleas, the plaintiffs replied, that the bankrupts as soon as possible after the loss, namely, on the 1st of July, 1792, procured and delivered to the company such certificate as is required in the printed proposals under the hands of four respectable inhabitants, &c., but that the minister and churchwardens wrongfully refused to sign it without any reasonable or probable cause for so doing.

The rejoinder stated that the minister and churchwardens did not wrongfully refuse, &c.; on which issue was taken in the surrejoinder.

The jury found all the issues for the plaintiffs, and gave a verdict for 3,000*l*.

The defendant below removed the record into this Court by writ of error, and assigned for error that the declaration, the replication, and the other pleadings of the plaintiffs below, were not sufficient in law to maintain the action.

This case was twice argued in this Court, the first time in last Easter

Term by *Wood* for the plaintiff in error and *Lambe* for the defendants, and now by *Law* for the former and *Gibbs* for the latter.

Arguments for the plaintiff in error: The principal question is, whether a compliance with the printed proposals, which are referred to in the policy of insurance, requiring (*inter alia*) a certificate under the hands of the minister, churchwardens, and reputable householders, be or be not a condition precedent to the right of the plaintiffs below to recover; if it be, the plaintiffs below were not entitled to recover, and consequently the judgment of the Court of Common Pleas must be reversed. Now the proposals referred to in the deed constitute a part of the deed, and must be taken as incorporated into it. By those, the trustees for the Phoenix Office engaged to pay only on condition that the insured give notice of the loss, deliver in a particular of the loss, &c., and procure a certificate of the minister, churchwardens, and householders. In this case, the insured have only complied with the two former of these conditions, and therefore the trustees for the fire office are not answerable; the certificate of some of the householders alone, without the signatures also of the minister and churchwardens, not being sufficient. This stipulation is made in order to guard the insurance office from the manifold frauds that would otherwise be practised upon them by wicked and designing men; nor is there any thing illegal or even unreasonable in this precaution, the public as well as the insurance office being so deeply interested in the preservation of houses from losses by wilful fires. The language the office hold out to the public is this: "We will not insure any individual whose character is not known to the minister, churchwardens, and some of his neighbors." Individuals may or may not enter into this engagement at their option; it is a mere voluntary act on their part; but when they do enter into the contract, they must be bound by every part of it. If this were not to operate as a condition precedent, it could have no effect whatever; for as this is a deed-poll, in which there is no covenant by the assured, the insurance office would have no remedy against them if they did not comply with the condition. Then, if this be a condition precedent, it is no excuse for the insured to say that he cannot procure the certificate required. They engaged at all events to procure it before they called on the insurance office to indemnify them for the loss they sustained, and nothing can be considered as a dispensation with that but some act of the insurance office themselves, which is not shown here. It will be contended, however, that the minister and churchwardens wrongfully refused to sign the certificate without any reasonable or probable cause; but that fact, even if true, is immaterial in this case, because the assured engaged that this certificate should at all events be produced before their right of calling on the insurers attached. If a party undertake that a condition shall be performed by a stranger, and the latter refuses, this is no excuse, unless such refusal be procured by the other party. 1 Rol. Abr. 415, 452; *Doughty v. Neal*, 1 Saund. 216; *Hesketh v. Gray*, Say. 185; *Gruit v.*

Pinnel, 5 Vin. Abr. 207; Davies v. Mure, cited 1 T. R. 642; Pole v. Harrobin, cited *ib.* 644; and Campbell v. French, 6 T. R. 200. So, though the condition be highly improbable: 1 Rol. Abr. 420; Co. Lit. 201, 206 b.; Com. Dig. "Condition," 325, 348; Godb. 76; and there is no distinction in this respect between commercial and other instruments; a condition precedent must be strictly performed as well in the one case as in the other: Campbell v. French. But it is not true that the minister and churchwardens did without any reasonable or probable cause refuse to certify; for they were requested to certify that they believed that the insured had sustained a loss amounting to 7,000*l.*, whereas it appears by the verdict that their loss did not exceed 3,000*l.* And independently of all analogous cases, there are two determinations of the Court of Common Pleas on the policies of the Sun Fire Office, which are couched nearly in the same terms with the present policy, in favor of the insurance office. Routledge v. Burrell, 1 H. Bl. Rep. 254; and Oldman v. Bewicke,¹ 11 H. L. 26 Geo. III., C. B. In the last case the declaration stated that persons sustaining any loss by fire were to give notice, &c., to deliver in an account of their loss, &c., and procure a certificate under the hands of the minister and churchwardens, together with some other reputable inhabitants, &c., not concerned in such loss, &c., "but until such affidavit and certificate of such loss should be made and produced, the loss money should not be payable." The defendant pleaded, 1st. That the premises were wilfully set on fire; and 2d. That the bankrupt had no interest in the premises. After verdict for the plaintiff for 3,000*l.*, a motion was made in arrest of judgment, which after argument was made absolute; Gould, J., saying, "until such affidavit is made and certificate procured, the money is not payable; the time of payment therefore is not yet come. Though he be a *bona fide* sufferer, still he is not entitled without a certificate. The stipulation is a condition precedent, that there shall be a certificate that there was no kind of fraud." If then the procuring of this certificate be a condition precedent, as it is not alleged in the declaration that such a certificate was procured, it cannot be presumed even after verdict; for this is a defective title appearing in the declaration itself.

Arguments for the defendants in error: It may be admitted that, if the procuring of the certificate be a strict condition precedent, no right of action could accrue to the insured until they had procured it; therefore none of the cases cited of strict conditions precedent need be disputed. But on advertng to the printed proposals it will be seen that the procuring of the certificate is not a condition precedent, but a mere regulation of the fire office. There is a marked distinction in the penning of the proposals between the first, which speaks of a loss by invasion, and the others, of which that respecting the certificate is one. In the former the insurance office expressly stipulate that they will not be answerable; but immediately afterwards, speaking of the other

¹ See 2 H. Bl. 577, note (a). — ED.

articles, they studiously change the language: "And also all persons insured shall give notice, procure a certificate," &c. But these are evidently mere regulations in the office; and in order to construe this to be a condition precedent, the Court must vary the terms of the proposals, and instead of "and also," must substitute words like these, "and until all persons insured shall have given notice and procured a certificate, &c., the insurers will not be answerable." The variation of expression in these proposals strongly shows the intention of the parties, which, according to the case of *Hotham v. The East India Company*, must be the rule of decision. The procuring of a certificate is not a fact on which the plaintiff's title is founded; it is merely evidence of that title; but here that title is made out without it. Taking the whole of the instruments together it appears to have been the intention of the parties that the assured should recover for any loss, provided there was no fraud on their part; here the loss by fire is ascertained by the verdict, and all fraud on their part is negatived. It may be admitted that these regulations must be complied with as far as the assured themselves can comply: but here was a compliance *cy pres*; the assured did every thing in their power to comply with them; they gave notice, delivered in an account, and procured a certificate by four reputable householders, and also required the signatures to it of the minister and churchwardens, which the latter wrongfully and without any reasonable or probable cause refused. But such improper refusal ought not to prejudice the right of the assured, who did every thing required on their parts to be performed. In *Moser and another v. The Churchwardens and Overseers of the United Parishes of St. Magnus and St. Margaret*, in Trinity Term, 1795, a bill for relief was brought against the defendants, who had employed the plaintiffs to fix up two stoves in the church of St. Magnus, under an agreement by which the plaintiffs engaged to complete the work on or before a certain day "to the satisfaction of Mr. Trecker, a surveyor," and the money was to be paid on a given day, "in case the said surveyor should certify that the same was completed agreeably to the contract." The bill stated that the work was finished according to the contract, but that the surveyor refused to certify, &c. On the hearing of the cause it was argued on behalf of the defendants that the bill should be dismissed because the plaintiffs had their remedy at common law, it being a fair and direct issue to try whether the certificate was or was not properly withheld by the surveyor, and the surveyor having no right to refuse the certificate arbitrarily; and upon this ground the Master of the Rolls dismissed the bill. It is clear also, from the possibility of a loss happening in extraparochial places where there is no minister, or in small hamlets where there are no churchwardens, that it was not the intention of the parties that the procuring of a certificate should be considered as a condition precedent to the right of the assured to recover. This case is distinguishable from some of the analogous cases cited, and from the two cases of the Sun Fire Office. In *Davies v. Mure*, where the defendants

had covenanted that if the ship (which was a merchants' ship) should be taken, &c., and it should appear to a court-martial that the ship's company had made the utmost defence they were able, they would pay the value, &c., Lord Mansfield directed an inquiry to be made at the Admiralty as to the usage, on whose requisition courts-martial were held on losses of merchants' ships. Now that inquiry was wholly immaterial, if the Court thought that the procuring of a court-martial by the plaintiff was a condition precedent to his right of action. In that case, as well as the case of *Campbell v. French*, the party had not done every thing in his power to perform the condition, and therefore he could not rely on a performance *cy pres*. And with regard to the two other cases of *Routledge v. Burrell* and *Oldman v. Bewicke*, the same answer may be given to both: there the words of the printed proposals differed from the words here in this essential article, that there it was expressly agreed that "until such affidavit and certificate of such the insured's loss should be made and produced, the loss money should not be payable." But the insertion of those words by the Sun Fire Office in their proposals, and the omission of them by the Phoenix Office, strongly show that the latter did not mean to insist on the production of a certificate as a condition precedent to the right of the assured. But in the case of *Hotham v. The East India Company*, the Court expressly held that the procuring of a survey to be taken was not a condition precedent, and there the words are stronger than in the present case, "that no allowance should be made for short tonnage, unless it should be made to appear on a survey," &c.

But at all events the assured may recover on the second count in the declaration, where the breach assigned is for not referring the matter to arbitration, and it cannot be pretended that the procuring of the certificate was a condition precedent to the reference; the consequence of this is, that a *venire de novo* must issue to assess damages on that count.

In reply, as to the second ground, it was said that the same objection applied to the second as to the first count; that by the printed proposals the assured were to give notice of the loss, deliver in an account, and produce the certificate required, and in case (that is, after those conditions were complied with) any difference arose, the matter was to be referred; and that to the second count there was a plea that the assured did not procure the certificate, &c., which led to the same question as arose on the first count in the declaration.

LORD KENYON, C. J. The second point respecting the *venire de novo* is now for the first time started, no notice having been taken of it on the first argument here, or on the motion to arrest the judgment in the Court of Common Pleas; if there appeared to be any ground for it, we would desire to have the case farther investigated; but it seems to me to have no foundation, because the objection that the procuring of the certificate is a condition precedent is as applicable to the second as to the first count of the declaration.

This case requires our serious consideration, because the Court of Common Pleas have already given their opinion on it in favor of the plaintiff's claim, though it has been suggested that it was not the unanimous opinion of that Court.¹ We are called upon in this action to give effect to a contract made between these parties; and if from the terms of it we discover that they intended, that the procuring of the certificate by the assured should precede their right to recover, and that it has not been procured, we are bound to give judgment in favor of the defendant below. These insurance companies, who enter into very extensive contracts of this kind, are liable (as we but too frequently see in courts of justice) to great frauds and impositions; common prudence, therefore, suggests to them the propriety of taking all possible care to protect them from frauds when they make these contracts. The Phoenix Company have provided, among other things, that the assured should, as soon as possible after the calamity has happened, deliver in an account of their loss, and procure a certificate under the hands of the minister and churchwardens, and of some reputable householders of the parish, importing that they knew the character and circumstances of the assured, and believed that they had sustained the loss without any kind of fraud. That this is a prudent regulation, this very case is sufficient to convince us; for it appears on the record, that soon after the fire the assured delivered in an account of their loss, which they said amounted to 7,000*l.*, that they obtained a certificate from some of the reputable inhabitants that the loss did amount to that sum, and that the jury after inquiring into all the circumstances were of opinion that the loss did not exceed 3,000*l.*; and yet it is also stated that the minister and churchwardens, who refused to certify that they believed that the loss amounted to 7,000*l.*, wrongfully and without any reasonable or probable cause refused to sign such certificate. The great question here is, Whether or not it was the intention of these parties that that certificate should precede payment by the insurance office; now it seems to me from the printed proposals that it was their intention that it should precede payment. What is a condition precedent, or what a condition subsequent, is well expressed by my brother Ashhurst in the case of *Hotham v. The East India Company*, to which I refer in general. If there be a condition precedent to do an impossible thing, the obligation becomes single; but however improbable the thing may be, it must be complied with, or the right which was to attach on its being performed does not vest. If the condition be, that A. shall enfeoff B., and A. do all in his power to perform the condition, and B. will not receive livery of seisin, yet from the time of Lord Coke to the present moment, it has not been doubted but that the right which was to depend on the performance of that condition did not arise. In the case of *Hesketh v. Gray*, which has been cited as a determination in this court, there was also an applica-

¹ Mr J. Heath differed from the rest of the Court of C. B.

tion to the Great Seal, at the time when Lord Chief Justice Willes was the first commissioner, to dispense with the condition, which was, that the Bishop of Chichester should accept the resignation of a living; but it was held, that there was no ground for a court of equity to interfere. This Court also held, when the case came before them, that it was a condition precedent, and must be performed.

In this case, however, it is said that, though the minister and churchwardens did not certify, some of the inhabitants did certify, and that that was sufficient, it being a performance of the condition *cy pres*. But I confess, I do not see how the terms *cy pres* are applicable to this subject; the argument for the plaintiffs below goes to show that if none of the inhabitants of this parish certified, a certificate by the inhabitants of the next or of any other parish would have answered the purpose. But the assured cannot substitute one thing for another. In the case of *Campbell v. French*, we explained the grounds of this doctrine, and said that the party who had not complied with the condition could not substitute other terms or conditions in lieu of those which all the parties to the contract had originally made. So here it was competent to the insurance office to make the stipulations stated in their printed proposals; they had a right to say to individuals who were desirous of being insured, "Knowing how liable we are to be imposed upon, we will, among other things, require that the minister, churchwardens, and some of the reputable inhabitants of your parish shall certify that they believe that the loss happened by misfortune and without fraud, otherwise we will not contract with you at all." If the assured say that the minister and churchwardens may obstinately refuse to certify, the insurers answer, "We will not stipulate with you on any other terms." Such are the terms on which I understand this insurance to have been effected; and, therefore, I am clearly of opinion, that there is no foundation for the action, and that the judgment below must be reversed.

ASHHURST, J. The question is, whether the certificate required be or be not a condition precedent; if it be, the plaintiffs below cannot maintain their action. It is perfectly immaterial whether they have entered into an improvident contract; if they choose to take the burden upon themselves, they cannot call on the insurance office until they have complied with the condition. I think that it is a condition precedent, and that the assured engaged at all events to procure the certificate before they applied to the office for an indemnity. Nor is there any thing unreasonable in these terms. It is well known that great frauds are sometimes practised on the insurance offices; and, therefore, it behooves them to take all care to prevent frauds. In order to guard more effectually to protect the Phoenix Company, they insist on having a certificate from the minister and churchwardens, from persons who are not likely, from their situations in life, to assist in such frauds. But as the plaintiffs below have not procured that certificate, they cannot maintain this action.

GROSE, J. Four questions arise on this record: First, whether the printed proposals are to be taken as part of the policy of insurance;

Secondly, whether that part respecting the certificate creates a condition precedent; Thirdly, if it does, whether the assured were bound to perform the conditions; Fourthly, whether they have performed it. These are the material points. On the first, the case of *Routledge v. Burrell* is decisive to show that the printed proposals are to be taken as part of the policy. The second point also seems to me to be decided by the case of *Oldman v. Bewicke*. For though the words in both proposals are not exactly similar, the substance is the same. And what my brother Ashhurst said in the case of *Hotham v. The East India Company*, is applicable here, that there are no precise words necessary to make either a condition precedent or subsequent, but that the question must depend on the intention of the parties. As to the third point, the cases alluded to by the defendant's counsel (to which another in 22 Edw. IV., 26 b, may be added) are strong to show that if a person engage for the act of a stranger, he must procure that act to be done. With regard to the last point, the assured have not obtained the certificate required, but they have procured a certificate which, under the circumstances of the case, they consider equivalent to it, namely, a certificate by some of the reputable inhabitants of the parish. It is true that the minister and churchwardens were not bound to certify; but the assured undertook to procure such a certificate; that is a condition on performing which alone the Phoenix Company engaged to pay any loss that might arise. It is admitted that the assured did not procure such a certificate; but they say that the minister and churchwardens wrongfully and without any reasonable or probable cause refused it; but that, if true, is no ground for supporting this action; it is a misfortune to the plaintiffs, but it ought not to prejudice the defendant. It is not sufficient that there is no probable cause for not certifying, there ought to be a probable cause to induce the minister and churchwardens to certify; they ought to be satisfied with the truth of the loss before they certify. Here they were requested to certify that the plaintiffs had sustained a loss to the amount of 7,000*l.*, but the jury found that the loss only amounted to 3,000*l.*; therefore, the minister and churchwardens could not in conscience sign the certificate which was offered to them. If the certificate which the assured procured were considered as a compliance with this condition, a certificate by the inhabitants of any other parish might equally be substituted in lieu of that which was required; but it is not competent to the assured to substitute other terms for those which were the foundation of this contract.

With regard to the question relative to a *venire de novo*, if a *venire de novo* were awarded, the plaintiffs could not recover on the second count for want of a certificate.

LAWRENCE, J. If the matter were to go to arbitration, and no certificate were produced, the arbitrators ought to determine against the plaintiffs; therefore it would answer no purpose to grant a *venire de novo*.

With respect to the principal question, this is an action to recover

a loss which the insurance office are only liable to make good according to the terms of their engagement. There is no ambiguity in those terms; they were perfectly well known to all parties, and the plaintiffs below must be considered as having assented to them. It has been argued, however, that the certificate was not a condition precedent, and that the plaintiffs' right attached on the happening of a fire without fraud, and that this may be collected from the difference of penning the different proposals. But it does not seem to me that a fire without fraud will give the assured a right of action; it must be a fire accompanied with the notice, affidavit, and certificate, specified in the proposals. And as to the wording of the different articles, that speaking of a loss by foreign enemies, &c., is an exception; it is a loss for which the insurance company are not answerable; and for other losses they are only liable on certain conditions. Then it was argued on behalf of the plaintiffs below that it was sufficient for them to perform the conditions in substance; even admitting that argument to be well founded, there was no substantial performance here. In some cases in the books respecting conditions precedent, where the thing agreed to be done was in effect performed, though not in the exact manner, nor with all the circumstances mentioned, it was deemed a substantial performance; as where the condition was to enfeoff, a conveyance by lease and release has been deemed a compliance. So if the condition be to deliver the will of the testator, and he delivers letters testamentary. 1 Rol. Abr. 426, pl. 2, 4. But this, instead of being a substantial performance of the condition, is only a substitution of one thing for another. Suppose the terms of this contract had been that the insurance office should not pay any loss unless A. B. and C. certified, it would not have been sufficient for E. F. and G. to certify. So here the agreement was that persons of certain characters should certify; and when the assured substitute, for such a certificate, one signed by persons bearing different characters, it is the same as a certificate signed by persons of different names from those required. Perhaps it is difficult to ascertain who shall be called reputable or substantial persons; and in order to avoid this difficulty, the insurance office insist on the certificate being signed by persons who hold public situations in the parish. These terms seem highly reasonable; it is a duty that the office owe to the public as well as to themselves to take every precaution to protect them against fraud; and unless some such check as the present were interposed, the office would be holding out a premium to wicked men to set fire to their own houses. Then as this is a condition precedent, even supposing that the refusal by the minister and churchwardens were a wrongful act in them (which I do not admit under these circumstances), the cases are uniform to show that if a person undertake for the act of a stranger, that act must be done. Therefore I agree that the judgment below must be reversed.

*Judgment reversed.*¹

¹ Johnson v. Phoenix Ins. Co., 112 Mass. 49, *accord.* Compare Blacksmith v. Fel lows, 3 Seld. 401, 414-417. — ED.

SHADFORTH v. HIGGIN.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, HILARY TERM, 1813.

[Reported in 3 Campbell, 385.]

ASSUMPSIT upon the following agreement signed by the plaintiff and defendant: —

“James Shadforth, part-owner of the ship *Fanny*, of 300 tons, coppered and armed, agrees to despatch said vessel immediately in ballast direct to Jamaica, and, on her arrival at Rio Nova Bay, Salt Gut, and St. Ann’s, receive a full and complete cargo of produce, consisting of sugar, rum, coffee, and pimento. In return Messrs. Higgin & Co. agree to provide a cargo at the above shipping places, to be taken on board in the usual manner, in time for July convoy, provided she arrives out and ready by the 25th of June, and the freight to be at the current rate as given to other vessels loading at the same time and same ports.”

The declaration alleged that the plaintiff did immediately despatch the vessel in ballast to Jamaica, and that, on her arrival at Rio Nova Bay, she was afterwards, to wit, on the 3d of July, and from thence for a long space of time, to wit, for the space of three months from thence next ensuing, ready to receive at Rio Nova Bay, Salt Gut, and St. Ann’s, aforesaid, a full and complete cargo of produce, according to the form and effect of the said agreement; yet that the defendant did not nor would provide a cargo for the said vessel at the above shipping places, or any or either of them, according to the form and effect of the said agreement, whereby the said ship was obliged to return from Jamaica without any cargo being loaded on board thereof.

The ship in point of fact did not reach Jamaica till the 3d of July; and the question was, whether under these circumstances the defendant was answerable for having failed to furnish her with a full cargo.

Garrow, S. G., for the plaintiff, contended that the defendant was bound to furnish a full cargo for the ship at all events. Provided she arrived out and was ready by the 25th of June, this was to be done in time to enable her to sail with the July convoy. The condition of her arriving by 25th June only applied to the time of her departure on the homeward voyage. If by any accident her arrival was delayed beyond the day specified, she was still entitled to a cargo in a reasonable time, as if the proviso and the mention of the July convoy had not been introduced into the agreement. It could hardly be meant, that where the owner was absolutely bound to despatch his ship to Jamaica, if she arrived a day later than was expected, the freighter might send her home empty.

LORD ELLENBOROUGH. I think the arrival of the ship by the 25th June was a condition precedent. The freighter might know that, if she

arrived by that day, he could easily provide a cargo for her; but that afterwards it might be impossible. He might have had goods of his own, which it was essentially necessary should be shipped by that day, and which he was therefore compelled to load on board another vessel. It would be a great hardship upon the freighter, if he were bound to provide a freight for a vessel which arrives at a season of the year when there is no produce ready for shipping in the island. If the freighter is liable, although the ship does not arrive till a week after the day agreed upon, where is the line to be drawn? I think the fair interpretation of the instrument is that, unless the ship arrived by the 25th June, the defendant's liability was to be at an end.

The plaintiff likewise failed in establishing another agreement declared upon for the loading of the ship, and submitted to be nonsuited.

FREEMAN v. TAYLOR.

IN THE COMMON PLEAS, NOVEMBER 25, 1831.

[*Reported in 8 Bingham, 124.*]

ASSUMPSIT to recover damages for the breach of a contract of charter-party, whereby the defendant chartered of the plaintiff "The Edward Lombe, for a voyage from London to Madeira and the Cape of Good Hope," thence "with all convenient speed" to Bombay, where the defendant was to load the ship with a cargo of cotton and other goods, and from Bombay back to London, the cabins and between-decks of the vessel being reserved for the benefit of the plaintiff. The plaintiff averred performance of the charter-party on his part, and alleged a breach by the defendant in refusing to furnish any cargo for the ship at Bombay.¹ The defendant pleaded the general issue.

At the trial before TINDAL, C. J., London Sittings after Trinity Term, 1830, it appeared that the ship sailed from London on the 20th of May, 1828, with a cargo shipped by the defendant for Bombay, and arrived at the Cape of Good Hope on the 28th of September following. She might have proceeded on her voyage on the 30th; but the captain detained her till the 8th of October, being occupied in stowing the between-decks on his own account with a cargo of mules and cattle for the Mauritius. On the 4th of October, the defendant's agents at the Cape protested against the delay, and against the ship's going to the Mauritius, on the ground that it was out of her course. The captain, however, insisted that it was not out of the course, nor any violation of

¹ The original report sets out the declaration with great prolixity; but as no question arose upon it, this short statement has been here substituted in its place. — ED.

the terms of the charter-party. He proceeded accordingly, arrived at the Mauritius on the 10th of November, and remained there till the 19th, discharging his mules and cattle. On the 19th he sailed for Bombay, where he arrived on the 9th of January, 1829, — six or seven weeks later than he would have arrived, if, on the 28th of September, he had sailed direct from the Cape of Good Hope to Bombay. In the mean time, several ships had arrived at Bombay, which left England subsequently to *The Edward Lombe*; and the defendant's agents refused to procure a cargo of cotton to freight that ship back. The captain remained at Bombay till the 17th of March, during which time he took on board, on his own account, whatever goods he could procure, and then proceeded to Ceylon for further cargo, with which he returned to London.

The plaintiff by this action sought to recover the difference in value between the freight so earned and that which would have accrued from the defendant's cargo of cotton. The freight for the voyage out had been paid, partly in advance.

The Chief Justice told the jury that, inasmuch as the freighter might bring his action against the owner, and recover damages for any ordinary deviation, he could not, for such a deviation, put an end to the contract; but if the deviation was so long and unreasonable that, in the ordinary course of mercantile concerns, it might be said to have put an end to the whole object the freighter had in view in chartering the ship, in that case the contract might be considered at an end; and he left it to the jury to decide whether the delay here was of such a nature as to have put an end to the ordinary objects the freighter might have had in view when he entered into the contract.

The jury found for the defendant.

Taddy, Serjt., obtained a rule *nisi* to set aside the verdict, on the ground that the defendant's remedy for the alleged deviation, if he had been injured by it, was by cross-action; and that he was not at liberty, in the exercise of his own discretion, to put an end to the contract between him and the plaintiff. The engagement to sail from the Cape with all reasonable speed was not a condition precedent, but an independent covenant, for the breach of which the defendant might be entitled to sue; it did not go to the whole of the consideration for the defendant's contract, as was manifest from the circumstance that the defendant had not shown that his object in hiring the ship had been defeated by the plaintiff's delay. Unless it went to the whole consideration, it was not a condition precedent, the neglect of which would entitle the defendant to determine the contract.¹ . . .

Wilde and *Bompas*, Serjts., showed cause. The verdict of the jury, coupled with the previous direction, amounts to a finding that the object of the charterer's contract was entirely defeated by the unjustifiable delay of the plaintiff; it follows, therefore, that the engagement

¹ The learned Serjeant here stated the cases of *Bornmann v. Tooke*, *Havelocke v. Geddes*, and *Davidson v. Gwynne*. — Ed.

to proceed from the Cape with all reasonable speed was a condition precedent, going to the entire consideration for the contract; and as such, while the contract remained executory, the breach of it was an answer to the plaintiff's demand. *Boone v. Eyre*,¹ *Duke of St. Albans v. Shore*. The plaintiff having by his wilful act defeated the object of the defendant, has no longer any claim against him. Thus, in *Soames v. Lonergan*,² where the charterers of a ship for a voyage from Cadiz to St. Blas, and thence to Guayaquil, to take in a homeward cargo, caused another ship to be chartered on their account to go out in ballast and bring home a cargo from Guayaquil, with a proviso that, in the event of the non-arrival of the first mentioned ship at Guayaquil, then the second charter should be void: it was held, that "non-arrival" meant non-arrival within such time as might answer the purposes of the charter of the second ship; and that the first ship not having arrived in time to answer those purposes, and the delay not having been attributable to the charterers, the charter of the second ship was void, and the charterers were not bound to provide a homeward cargo for her. In *Touteng v. Hubbard*,³ where a British merchant chartered a Swedish ship on a voyage to St. Michael's for a cargo of fruit, and the charter-party contained the usual exception against the restraint of princes, the ship having been prevented from reaching St. Michael's within the fruit season by an embargo laid on Swedish vessels by the British government, it was held the Swedish owner could not, by proceeding on the voyage after the embargo was taken off, entitle himself to recover the freight against the British merchant. So in *Shadforth v. Higgin*, where a ship was freighted to go in ballast to Jamaica, and bring home a cargo from thence, and the freighter undertook to provide a full cargo for her in time for the July convoy, provided she arrived out and was ready by the 25th of June, it was held that, as she did not arrive out till after the 25th of June, the freighter was entirely discharged from his contract to furnish a cargo.

In the cases relied on for the plaintiff, either the stipulation was no condition precedent, or it did not appear, as in the present case, that the party had been deprived of the benefit of the contract. Thus, in *Bornmann v. Tooke*, there was no finding that the object of the defendant had been defeated. In *Havelock v. Geddes* the defendant made use of the ship, and thereby waived the right of insisting on seaworthiness as a condition precedent. In *Davidson v. Gwynne* the benefit of the voyage was obtained, although the ship did not sail according to agreement with the first convoy. Whether or not a stipulation shall operate as a condition precedent, and goes to the entire consideration, depends, says Lord Ellenborough, not on any formal arrangement of the words, but on the sense and reason of the thing, as it is to be collected from the whole contract: *Ritchie v. Atkinson*; and on that principle all the cases may be reconciled: *Thomas v. Cad-*

¹ 2 W. Blacks. 1312.² 2 B. & C. 564.³ 3 B. & P. 291.

wallader, *Goodisson v. Nunn*, *Porter v. Shepherd*,¹ *Campbell v. Jones*, *Cook v. Jennings*,² *Glazebrook v. Woodrow*, *Smith v. Wilson*, *Storer v. Gordon*, *Fothergill v. Walton*. Com. Dig. Condition precedent, G. 5, is express that it ought to be performed within a reasonable time.

Taddy. The defendant having had the benefit of the outward voyage, and having adduced no proof of loss occasioned by the late arrival of the ship at Bombay, it was not competent to the jury to find that the whole object of the contract was defeated. In *Touteng v. Hubbard*, *Soames v. Lonergan*, and *Shadforth v. Higgin*, nothing was done for the benefit of the charterers on the outward voyage; the ships went out in ballast. And in *Havelock v. Geddes*, Lord Ellenborough said, "Had the plaintiff's neglect precluded the defendants from making any use of the vessel, it would have gone to the whole consideration, and might have been insisted upon as an entire bar; but as the defendants have had some use of the vessel, notwithstanding the plaintiff's neglect, the plaintiff's covenant is to be considered as going to a part only; the consideration has not wholly failed, and the covenant cannot be looked upon as having raised a condition precedent, but merely gives the defendants a right under a counter action to such damages as they can prove they have sustained from such neglect." [TINDAL, C. J. The plaintiff here has been paid for the outward voyage.] Still *Bornmann v. Tooke* and *Constable v. Cloberie* are express authorities to show that the stipulation here as to proceeding direct to Bombay was not a condition precedent. *Goodisson v. Nunn*, *Glazebrook v. Woodrow*, and *Kingston v. Preston*, there cited, were all cases of sale and purchase, involving concurrent conditions, which could not be pleaded one against the other, and inapplicable to the present case; but *Campbell v. Jones* is in point for the plaintiff. There A., in consideration of 250*l.* paid by B., and of the further sum of 250*l.* to be paid, &c., covenanted that he would, with all possible expedition, instruct B. in a certain mode of bleaching linen (for which he had obtained a patent); and B. covenanted that he would, on or before the 25th of February, 1794, or sooner if A. should before that time have instructed him, &c., pay the further sum of 250*l.*; it was held that the covenants of A. and B. were independent covenants; and that A. might sue B. for the 250*l.*, without averring that he had taught B. the mode of bleaching linen, &c.

Cur. adv. vult.

TINDAL, C. J. This was an action of assumpsit upon a charter by the plaintiff to the defendant of the ship *Edward Lombe*, from London to Madeira and the Cape of Good Hope, and thence to Bombay and back; the plaintiff claiming a compensation in damages against the defendant for not loading the ship with a cargo of cotton at Bombay.

At the trial it appeared in evidence, that, instead of proceeding by

¹ 6 T. R. 665.

² 7 T. R. 381.

the direct and usual course from the Cape of Good Hope to Bombay, the captain made a deviation to the island of Mauritius; and that the defendant's agents at Bombay, in consequence of such deviation, refused to find a cargo.

The point left to the jury at the trial was, whether the deviation was of such a nature and description as to deprive the freighter of the benefit of the contract into which he had entered; the jury being told that, if such was their opinion, the defendant was excused, by the act of the plaintiff's captain, from furnishing a cargo.

The jury having determined that question in the affirmative, and having found a verdict for the defendant, a motion was made to set the verdict aside, and for a new trial, on the ground of misdirection.

But, after hearing the arguments against and in support of the rule, we are of opinion, upon the same principle as that which was laid down in the case of *Mount v. Larkins*,¹ and which we therefore think it is unnecessary to repeat, that the direction was right; and we therefore think the rule for a new trial must be discharged.

Rule discharged.

MORGAN v. BIRNIE.

IN THE COMMON PLEAS, APRIL 17, 1833.

[*Reported in 9 Bingham, 672.*]

THIS was an action on a builder's contract, by which it was stipulated, among other things, that all the proposed erections should be done in a good and workmanlike manner, and with good, sound, and well-seasoned materials, and be completed to the reasonable satisfaction of A. B. Clayton, or other the architect for the time being of the defendant, his executors or administrators, on or before the twenty-ninth day of October next ensuing the date thereof, or such further day as the said A. B. Clayton, or such other architect, and the said plaintiff should mutually agree upon. It was further provided, that no additions or alterations should be admitted unless directed by the defendant, his executors or administrators, or his or their surveyor, in writing; nor should any additions to or alterations of the works thereby contracted for, and contained in the particulars therein specified, vitiate or vacate the contract thereby made, but the price or allowance to be made in respect of any agreed additions or alterations should be added to or deducted from the moneys that should become payable by virtue of the said memorandum of agreement as the case might require, such price or allowance being first estimated or settled by the surveyor or architect of the said defendant, who should be sole arbitrator in settling

¹ 8 Bing. 108.

such price or allowance, and all disputes that should or might arise in or about the premises: And the defendant thereby promised and agreed, in consideration of the buildings and works to be done and executed by the said plaintiff, in manner in the said memorandum of agreement mentioned, that the defendant would pay, or cause to be paid, to the plaintiff, the sum of 1,250*l.* in manner following, that is to say, that he would pay or cause to be paid such a sum of money as would be equal to three-fourth parts of the price of the works thereby contracted for, which should have been executed and performed according to the true intent and meaning of the said memorandum of agreement, upon receiving a certificate in writing signed by the said A. B. Clayton, or other the architect of the defendant, testifying that the flooring-joists of the first story of the said dwelling-house had been actually laid, and his approval of the works so executed; such further sum of money as would be equal to three-fourth parts of the price or value of the further works that should have been done subsequently to the date of the architect's said certificate, upon the completion of the carcase of the dwelling-house; and the balance or sum which should be found due to the plaintiff, after deducting the two previous payments, within two calendar months after receiving the said architect's certificate that the whole of the buildings and works thereby contracted for had been executed and completed to his satisfaction.

The work having been completed, the plaintiff sought by this action to recover his charges for some additional work not contained in the original contract.

At the trial it appeared that Mr. Clayton, the architect, had examined and approved of the plaintiff's charges for the buildings mentioned in the agreement, and had written the following letter to the defendant, more than two months before the action:—

With this you will receive Mr. Morgan's account. My private statement, showing the variations of prices and qualities, shall be copied and forwarded to you. As regards to when and where executed, my only data exist in my measuring book, which shall be open for your inspection at any time at my office. I also forward you the drawings marked 6 and 7, and the original elevation and plan submitted to the commissioners of woods and forests.

I remain, &c.

A. B. CLAYTON.

March 24, 1832.

This letter contained an account, headed, "Final statement of extras and omissions of the carcase of a house for George Birnie, Esq., by T. Morgan, builder."

A letter was also put in, addressed to Clayton by the defendant, April 4, 1832, in which he asked for Clayton's private statement of prices and quantities; expressed himself anxious to have the matter speedily settled, and made no objection on the ground of not having received a certificate. But as it did not appear that Mr. Clayton had ever given any certificate of his satisfaction as to the mode in which the

work had been executed, Tindal, C. J., directed a nonsuit, on the ground that the delivery of such a certificate was a condition precedent to the plaintiff's right of action.

Spankie, Serjt., now moved to set aside this nonsuit on the ground that the agreement did not require the certificate touching the additions to be in writing; and that Mr. Clayton's allowance of the plaintiff's charges must be deemed an implied certificate, for he could not allow the charges to be correct without implying thereby that the building had been executed to his satisfaction. Besides, it might be doubtful whether any certificate were requisite with respect to charges for additional work; the certificate was to apply only to the building as originally contracted for, and the defendant had never objected to pay on the ground that a proper certificate had not been rendered.

TINDAL, C. J. I was of opinion at the trial, and am still of opinion, that the production of a certificate from Mr. Clayton was a condition precedent to the bringing this action. The agreement stipulates, that the price of additions or alterations should be added to the sum contracted for by the agreement, such price being first settled by the architect of the defendant, who should be sole arbitrator in settling such price, and all disputes that should arise about the premises. Then follows the stipulation for payment in proportion to the work done at two different periods upon receiving a certificate in writing of Mr. Clayton's approval, and for payment of the balance of the whole within two calendar months after receiving the said architect's certificate that the whole of the buildings contracted for had been executed to his satisfaction. That appears to involve not only the original but the additional or extra works. Unless the letter and delivery of the plaintiff's account, and the checking that account by Clayton, amount to a certificate, no certificate has been given. It appears to me, that the effect of a certificate would be altogether different; applying to the manner in which the work has been done, while the checking the accounts applies only to the propriety of the charges.

The rest of the Court concurring, the rule was

*Refused.*¹

THURNELL v. BALBIRNIE.

IN THE EXCHEQUER, TRINITY TERM, 1837.

[*Reported in 2 Meeson & Welsby, 786.*]

THE first count of the declaration stated, that before and at the time of making the agreement and the promise and undertaking of the de-

¹ *De Worms v. Mellier*, L. R. 16 Eq. 554; *Hudson v. McCartney*, 33 Wis. 331; *Bannister v. Patty*, 35 Wis. 215, *accord.* Compare *Wyckoff v. Meyers*, 44 N. Y. 143 — Ed.

defendant thereafter mentioned, the defendant held, occupied, and enjoyed, at his request, certain rooms, apartments, and premises of the plaintiff, as tenant thereof to the plaintiff, the same then being part and parcel of a dwelling-house of the plaintiff, and in which there were certain goods and fixtures and chattels, to wit, &c., of the plaintiff, of great value, to wit, of, &c.; and thereupon heretofore, to wit, on the 26th of December, 1836, it was agreed by and between the plaintiff and the defendant in manner following, that is to say: the plaintiff then agreed to sell and deliver to the defendant, who then agreed to purchase and take of the plaintiff, the said goods, fixtures, and chattels, at a valuation to be made by certain persons, to wit, Mr. Newton and Mr. Matthews, or their umpire; and the plaintiff said, that the said Mr. Newton was appointed by and on behalf of the plaintiff, and the said Mr. Matthews by and on behalf of the defendant, to value as aforesaid. The declaration then averred mutual promises, and alleged that Newton, on behalf of the plaintiff, was ready and willing to value the said goods, &c., and at the request and by the authority of the plaintiff requested Matthews to value the same, whereof the defendant and Matthews had notice; but that the defendant and Matthews then and thence continually neglected and refused so to do. And the plaintiff further said, that he, the plaintiff, afterwards, to wit, on the 2d of February, 1837, gave notice to the defendant that the plaintiff's said appraiser and valuer, the said Newton, was ready to meet the defendant's appraiser and valuer, the said Matthews, or any other person he might think proper to nominate for the purpose on the defendant's behalf, at any time within ten days from the said 2d of February which the defendant might fix, to value the said goods, &c., of which the defendant then had notice, but then and thence hitherto wholly neglected and refused to appoint any day for his appraiser, the said Matthews, to value, and wholly neglected and refused to nominate any other appraiser, and during all that time has wholly refused and neglected to take any steps to value as aforesaid, or to cause or procure the same to be valued according to his said agreement and promise, and has during all the time aforesaid wholly refused to value the said goods, &c., or to let the same be valued, according to his said agreement and promise. And thereupon the said Mr. Newton afterwards, and after the lapse of a reasonable period of time, to wit, one month from the day and the year last aforesaid, proceeded to value and did then value the said goods, &c., and the price thereof upon such valuation reasonably amounted to the sum of 500*l.*, whereof the defendant had notice, and was requested to pay the same to the plaintiff. And the plaintiff further says, that he hath always from the time of making such valuation as aforesaid been ready and willing to sell and deliver to the defendant the said goods, &c., and to receive payment by him of the value thereof, whereof the defendant hath always had notice; yet the defendant, not regarding, &c., did not nor would, although often requested, take the said goods, &c., so agreed by him to be taken as

aforesaid, and pay the plaintiff the value thereof, but hath hitherto wholly neglected and refused so to do, whereby, &c.

There were also counts for goods and fixtures bargained and sold, and on an account stated.

Special demurrer to the first count assigning, amongst other causes, the following: that the count does not sufficiently allege a breach of the defendant's promise therein mentioned, for that it does not allege that the defendant hindered or prevented the said persons appointed and agreed on to make the said valuation, or either of them, from making such valuation. And also that it is alleged by way of breach that the defendant refused to take the goods, &c., agreed by him to be taken, and that he also refused to pay to the plaintiff the value of the said goods, &c., and no agreement or promise is stated in the said count to take the said goods, &c., at their value generally, or at the valuation made by the said Mr. Newton, but at the valuation only of the said Newton and Matthews, or their umpire. Joinder in demurrer.

Kelly, in support of the demurrer. There are many objections in point of form to this count; but the substantial question is, where two persons are by agreement appointed to make a valuation of goods, and one refuses, can either party be liable for a breach of the agreement? How could the defendant be bound to take or pay for the goods until they had been valued according to the agreement? [GURNEY, B. It is not said that Matthews omitted to value by the procurement of the defendant.] It is just as if an action were brought against a party to a submission, because one of the arbitrators refuses to make an award.

The Court here called upon

Hoggins, to support the declaration. It is specifically averred in the count that the defendant had notice that the plaintiff's appraiser was ready to value, and the breach assigned is, that he then wholly refused to let the goods be valued according to the agreement. It is submitted that that is sufficient to render him liable for the price. In *Hotham v. East India Company* it was held, that where the defendant by his neglect and default prevented the performance of a condition precedent in a charter-party, that was equivalent to a performance by the plaintiffs. In *Raynay v. Alexander*, where the plaintiff declared in assumpsit for non-delivery of fifteen tods of wool purchased by him out of seventeen, of which the defendant was possessed, the declaration was held bad for want of an allegation that the plaintiff had selected fifteen tods of the seventeen, which was an act to be first performed by him; but the Court said if the defendant would not have permitted the plaintiff to see the wool, that he might make election, that had excused the act to be done by the plaintiff, and had been a default in the defendant. If these cases be law, the facts alleged in this declaration make the defendant liable as for goods bargained and sold.

LORD ABINGER, C. B. I am of opinion that this count is bad. The agreement stated is an agreement to purchase the goods on the valuation of Newton and Matthews. There is no distinct allegation that

the defendant refused to permit Matthews to value on his part; but only an obscure statement that he refused to appoint any day for his valuing, or to take any steps to value or to cause and procure the goods to be valued, according to his agreement, and that he has refused to value the goods or to let them be valued according to his agreement; all which comes after the allegation that Matthews had refused to value, there being no statement that he had changed his mind and was ready and willing to do so, but that the defendant would not permit him. I am of opinion, therefore, that enough is not stated to render the defendant liable for the price of the goods.

BOLLAND, B., concurred.

ALDERSON, B. I should refer the words "or to let the same be valued," &c., to the defendant's letting the goods be valued by another appraiser instead of Matthews, according to the notice which the plaintiff says he gave him.

GURNEY, B., concurred.

Leave to amend on payment of costs ; otherwise judgment for the defendant.

GLAHOLM v. HAYS, IRVINE, AND ANDERSON.

IN THE COMMON PLEAS, HILARY TERM, 1841.

[Reported in 2 Munnings & Granger, 257.]

ASSUMPSIT to recover damages for a refusal to perform a contract of charter-party, whereby the defendants chartered of the plaintiff the ship Pomona, to proceed to Trieste, and having there loaded a complete and full cargo of wheat or other lawful merchandise, to proceed therewith to a good and safe port of the United Kingdom (calling at Cork or Falmouth for orders), and deliver the same on being paid freight, &c. "The vessel to sail from England on or before the 4th of February then next." The declaration contained a general allegation of performance on the plaintiff's part, and alleged a total failure to perform on the defendants' part.

The defendants pleaded, *inter alia*, that although the said vessel was required by the said charter-party to sail from England on or before the fourth day of February next after the making of the said charter-party, yet the said vessel did not sail from England on or before the said fourth day of February; but, on the contrary thereof, the said vessel remained and continued in England, without the leave or license and against the will of the defendants, for a long time after the said 4th day of February, to wit, until and upon the twenty-second day of February in the year aforesaid. Whereupon the defendants then refused to perform and fulfil the said charter-party, as they lawfully might do for the cause aforesaid. Verification.

To this plea the plaintiff replied, and the defendant demurred specially to the replication.

The argument and decision of the demurrer turned entirely upon the validity of the plea, the replication being admitted to be bad.¹

Shee, Serjt., in support of the demurrer. The replication is admitted to be bad. The Court will therefore have to decide upon the validity of the plea; which depends on the question, whether the engagement on the part of the plaintiff that the vessel should sail from England on or before the 4th of February, is to be considered as a condition precedent. [TINDAL, C. J. Suppose the wind was directly contrary?] In *Shadforth v. Higgin*² the freighter had engaged to provide a cargo at a port in Jamaica in time for the July convoy, "provided she arrived out and was ready by the 25th of June." It was held by Lord Ellenborough, C. J., that the arrival of the vessel by the 25th of June was a condition precedent to the obligation to provide any cargo. In *Shubrick v. Salmond*³ the defendant covenanted that the vessel should proceed from the port of discharge in Madeira to Wynyrd in South Carolina, directly as wind and weather would permit after the discharge of the outward cargo. The charter-party contained a clause releasing the plaintiff from the obligation to provide a cargo at Wynyrd, in case the ship should not arrive there by the 4th of March. The declaration assigned a breach in not arriving at Wynyrd on the 4th of March, or at any time afterwards; to which the defendant pleaded, that it was impossible, after the discharge of the cargo, to arrive at Wynyrd by the 4th of March. It was held, upon demurrer to this plea, that the defendant's engagement that the ship should proceed to Wynyrd was an absolute engagement. In *Granger v. Dent*,⁴ upon a proviso in a charter-party, that if the ship did not arrive at her port of loading on or before a certain day, unless prevented by stress of weather or other unavoidable impediments, the freighter should not be obliged to provide a cargo: it was held, that if ordinary diligence were used to reach the port of loading, the case was within the exception, though the causes by which the ship was detained might by extraordinary exertion have been overcome. There, unless the arrival of the ship before the particular day had been held to be a condition precedent, it would have been unnecessary to consider whether the case fell within the exception. [MAULE, J. In *Granger v. Dent* the verdict for the defendant would have been wrong, supposing the stipulation not to amount to a condition precedent.] *Soames v. Lonergan*,⁵ *Stavers v. Curling*, *McAndrew v. Adams*,⁶ *Ritchie v. Atkinson*, *Havelock v. Geddes*, *Davidson v. Gwynne*, all show that this is a condition precedent. [MAULE, J. It will be said that if the sailing on the 4th of February is a condition precedent in this case, the sailing within a reasonable time would also have been

¹ The statement of the case has been materially abbreviated. — ED.

² *Sed vide* *Deffell v. Brocklebank*, 4 Price, 42, 43.

³ 3 Burr. 1637.

⁴ Moo. & Malk. 475, Lloyd & Welsby, 270.

⁵ 2 B. & C. 564, 4 D. & R. 74, Abbott, Law of Shipping, 5th ed. 195, 6th ed. 250.

⁶ 1 New Ca. 29.

held to be a condition precedent. There is a difficulty in saying that one is to be a condition precedent and not the other.]

Bompas, Serjt., contra. No authority has been adduced which proves this to be a condition precedent. All the cases cited show that it is not. None of the stipulations which precede and follow the clause in question can be contended to create a condition precedent. In *Shadforth v. Higgin* the terms of the proviso made it a condition precedent. *Soames v. Lonergan* and *Shubrick v. Salmond* are in favor of the plaintiff. The leading case upon this point is *Constable v. Cloderie*,¹ where it was held, that a breach of the covenant to sail with the first wind was no answer to an action for freight. This principle was acted upon in *Boone v. Eyre*, and in *Freeman v. Taylor*, *Bornmann v. Tooke*. In *Hall v. Cazenove* the opinion of the judges is directly in point. *Ritchie v. Atkinson*, *Davidson v. Gwynne*. The clause requiring the vessel to be ready to sail on a certain day is introduced for the benefit of the shipper. So in *Fothergill v. Walton*, where the ship-owner covenanted with the freighter to take on board six pipes of brandy at Havre de Grace, and to proceed to Terceira, and there take on board a complete cargo of fruit; it was held that, though this amounted to a covenant on the part of the freighter to ship the brandy at Havre, yet that such engagement did not create a condition precedent. A covenant is not a condition precedent because it is prior in point of time to other stipulations. In *Stavers v. Curling* it was laid down very strongly by the Court that the terms must be precise to create a condition precedent.

Shee, Serjt., in reply. The owner is not bound to wait from day to day, and look to his remedy by action against the freighter. The authorities cited for the plaintiff are all cases in which the parties had put their own construction upon the agreement. [TINDAL, C. J. That observation can hardly apply to those cases in which the agreement was by deed. *Davidson v. Gwynne*.] This is not a case of a deed. In *Abbott on Shipping*² it is said, "If either party is not ready at the time appointed for the loading of the ship, the other may seek another ship or cargo, and bring an action to recover the damages he has sustained."

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the Court.

The question raised upon this record is, whether the clause contained in the charter-party, set out in the declaration, viz., "the vessel to sail from England on or before the 4th day of February next," is a condition precedent on the part of the ship-owner, upon the non-compliance wherewith on his part, the defendants, the freighters, were at liberty to throw up the charter. The defendants in their plea have treated the clause as importing a condition; alleging in such plea that the vessel "did not sail from England on or before the said 4th day of February, but on the contrary remained and continued in England, without the

¹ *Palmer*, 397, 2 M. & Gr. 18; and see 1 Wms. Saund. 320 b.

² 5th ed. 179, 6th ed. 232.

leave and against the will of the defendants, for a long time after; whereupon the defendants refused to perform and fulfil the said charter-party, as they lawfully might;" and the plaintiff having demurred to this plea, the question on the legal construction of the charter-party is thereby raised.

Whether a particular clause in a charter-party shall be held to be a condition, upon the non-performance of which by the one party, the other is at liberty to abandon the contract, and consider it at an end; or whether it amounts to an agreement only, the breach whereof is to be recompensed by an action for damages, must depend upon the intention of the parties, to be collected, in each particular case, from the terms of the agreement itself, and from the subject-matter to which it relates.¹ "It cannot depend," as Lord Ellenborough observes, "on any formal arrangement of the words, but (must depend) on the reason and sense of the thing as it is to be collected from the whole contract." See *Ritchie v. Atkinson*. And looking, in the first place, at the terms of this agreement, we think some distinction must have been intended by the contracting parties, between this particular clause and those which precede and follow it, as to the nature of the obligations thereby respectively created. All the clauses of the charter-party, both prior and subsequent to the clause in dispute, are framed strictly and properly in the language of agreement only. The charter-party states, "it is mutually agreed between the parties, that the ship, being tight, &c., shall proceed to Trieste, and there load a complete cargo; that the said vessel being so loaded shall therewith proceed to a good and safe port in the United Kingdom; that the cargo shall be sent alongside; that the freight shall be paid in the manner therein stipulated; that forty running days shall be allowed the merchants." And then is interposed the clause now under discussion, viz., "the vessel to sail from England on or before the 4th day of February next." After which the charter-party continues in the same frame as before: That the vessel shall be addressed to the charterer's agents, &c. Referring, therefore, in the first place, to the variation between the language of the particular clause, and that of the clauses amongst which it is found, there is reasonable ground for surmising, that some distinction must have been intended between them; and no other distinction can exist, except that the one set of clauses sounds in agreement, and the other clause in condition.

The very words themselves, "to sail on or before a given day," do, by common usage, import the same as the words "conditioned to sail," or "warranted to sail on or before such a day;" and undoubtedly, if in the middle of a common bought and sold note for a cargo of corn, or any other goods, were found the words, "to be delivered on or before such a day," they would be held to amount to a condition; and the purchaser would not be bound to accept the cargo, if not ready for delivery by the day appointed.

¹ And see 1 M. & Gr. 851.

And looking at the subject-matter of the contract, without regarding the precise words, we think that construing the words as a condition precedent, will carry into effect the intention of the parties with more certainty than holding them to be matter of contract only, and merely the ground of an action for damages.

Both parties were aware that the whole success of a mercantile adventure does, in ordinary cases, depend upon the commencement of the voyage by a given time. The nature of the commodity to be imported, the state of the foreign and home market at the time the contract of charter-party is made, and the various other calculations which enter into commercial speculations, all combine to show that despatch and certainty are of the very first importance to their success; and certainly nothing will so effectually insure both despatch and certainty, as the knowledge that the obligation of the contract itself shall be made to depend upon the actual performance of the stipulation which relates to them.

The present case appears to us to be distinguishable from those cited on the part of the plaintiff, in both the particulars to which we have adverted, viz., that in this case the form of the stipulation is more nearly in the language of condition than in that of agreement, whilst in the cases cited the stipulation is in the language of covenant only; and again, that in this case the performance of the stipulation goes more to the very root and the whole consideration of the contract. And indeed in most or all of those cases the objection has not been taken until after the voyage had been performed, nor in many cases until after the goods had been accepted; so that it is manifest, the breach of the agreement of which the defendant complained, and which he sought to set up as the non-performance of a condition precedent, could not go to the whole of the consideration of the contract.

Such was the case of *Constable v. Cloberie*,¹ where the ship-owner covenanted, that his ship should sail with the first fair wind; the case of *Bornmann v. Tooke*, where the covenant was that the ship should sail with the first favorable wind; and the defence in each was set up against a demand for the freight, after the ship had performed her voyage and the merchant had accepted the cargo. So likewise in *Davidson v. Gwynne*, the covenant to sail with the first convoy was held not to be a condition precedent, the voyage being in fact performed; and so of the rest.

Upon the whole, therefore, we think the intention of the parties to this contract sufficiently appears to have been, to insure the ship's sailing at latest by the 4th of February, and that the only mode of effecting this is by holding the clause in question to form a condition precedent, which we consider it to have been.

Judgment for the defendant.

¹ Palmer, 397, Noy, 75, Abbott, L. S. 191, 2 M. & Gr. 18.

COOMBE v. GREENE.

IN THE EXCHEQUER, MAY 8, 1843.

[Reported in 11 Meeson & Welsby, 480.]

COVENANT. The declaration stated, that theretofore, to wit, on the 23d of April, 1832, by a certain indenture then made between the plaintiff of the one part, and the defendant of the other part (profert), the plaintiff, for the considerations therein mentioned, did demise, &c., to the defendant, his executors, &c., all that messuage or tenement, with the barn, stable, and buildings, and several closes of land, &c., therein described, for the term of ten years, at the rent of 100*l.* by four quarterly payments. And the defendant did, for himself, his heirs, executors, &c., thereby covenant with the plaintiff, her heirs, executors, &c., that he, the defendant, his executors, &c., should and would lay out and expend the sum of 100*l.*, being equivalent to the first year's rent for the said demised premises, in substantial and beneficial improvements of and additions to the said messuage or dwelling-house, and in the substantial and permanent repairs thereof, under the direction or with the approbation of some competent surveyor, to be named by and on the part of the said plaintiff, her heirs and assigns. The lease also contained a general covenant to repair, which was set out. Breach, that the defendant did not nor would, after the making of the said indenture and during the continuance of the said demise, or at any other time, lay out and expend the sum of 100*l.*, or any part thereof, in substantial and beneficial improvements of and additions to the messuage or dwelling-house, or in the substantial and permanent repairs thereof, under the direction or with the approbation of a competent surveyor, to be named by and on the part of the said plaintiff, her heirs or assigns, or otherwise according to the covenant in that behalf, but on the contrary thereof, the defendant, after the making of the said indenture, and during the continuance of the said demise and since, wholly neglected and refused so to do, although the said plaintiff always during the said term was ready and willing to appoint a competent surveyor to approve of such substantial and beneficial improvements of and additions to the said messuage, of which the said defendant during all that time had due notice.

Special demurrer, assigning for causes, *inter alia*, that it is not alleged in the said count, that the plaintiff has ever named a competent or any surveyor, under whose direction or approbation the defendant might or could have laid out and expended the said sum of money in repairing the said premises according to the said covenant; that it is not alleged or shown that the plaintiff was ready and willing to name a surveyor according to the said covenant; that it is not alleged that the plaintiff

ever offered to name a surveyor, to direct or approve of the laying out and expenditure of the said money by the defendant, &c.

Joinder in demurrer.

The defendant's points marked for argument were as follows : —

The defendant will contend that the breach is bad, because, inasmuch as the improvements of and additions to the messuage mentioned in the declaration were to be done under the direction of a surveyor to be named by the plaintiff, the naming of the surveyor by the plaintiff was a condition precedent to the performance of the covenant on the part of the defendant, and that the said first breach is bad for not averring performance, or some dispensation of performance, by the plaintiff, of such condition precedent. That if the naming of a surveyor by the plaintiff was not a condition precedent to the defendant's performance of the covenant, still, if any improvements or additions were made by the defendant, the naming of a surveyor by the plaintiff, and the disapproval of such improvements or additions by such surveyor, were conditions precedent to any right of action in the plaintiff on the said covenant; and, on the other hand, if no improvements or additions whatever were made, the said first breach is too large, uncertain, and ambiguous.

The plaintiff's points for argument were: The plaintiff will contend that the naming of a surveyor by the plaintiff was not a condition precedent, and that it was not necessary to aver performance or dispensation of performance by the plaintiff of the said supposed condition precedent; but that the breach assigned is good in all respects, and not open to the objections or any of them set forth in the demurrer and points for argument made by the defendant.

Bovill, in support of the demurrer. The objection is, that the declaration does not show that any surveyor was appointed, and, until a surveyor was appointed, there could be no breach on the part of the defendant. The money was to be laid out under the direction of a surveyor to be appointed by the plaintiff, which was a condition precedent, and, until he was so appointed, the covenant could not be performed by the defendant; and it is not enough to aver a readiness and willingness to appoint a surveyor, because the defendant had nothing to do with the appointment: it ought to have been shown distinctly that an appointment had been made. As it is, the declaration does not show that the defendant has broken his covenant.

Ogle, contra. The general covenant to repair is not controlled by the appointment of a surveyor; and there might be circumstances under which the plaintiff might be entitled to maintain an action, although a surveyor had not been appointed. Suppose the defendant had wilfully damaged or pulled down any part of the dwelling-house, could not the landlord have maintained an action for dilapidations, without a surveyor having been appointed? In such a case the tenant would be bound to rebuild it, and, in the event of his neglecting to do so, he would be liable to an action on the covenant.

PER CURIAM. The plaintiff has declared on a covenant by which the defendant undertook to expend the sum of 100*l.* in substantial improvements of and additions to the dwelling-house, and in the substantial repair thereof, under the direction and with the approbation of a surveyor. Now the appointment of a surveyor was a preliminary step, for until one was appointed he could not give directions as to how the money was to be expended. The defendant could not fulfil his part of the contract without the approbation of a surveyor, who was to direct and approve of his proceedings. The appointment of a surveyor is, therefore, a condition precedent to his liability to expend the 100*l.*; and, as the declaration does not aver any such appointment to have taken place, it is bad, and there must be *Judgment for the defendant.*¹

RAE v. HACKETT.

IN THE EXCHEQUER, MAY 1, 1844.

[*Reported in 12 Meeson & Welsby, 724.*]

ASSUMPSIT on a charter-party. The declaration stated, that, by articles of agreement made between the plaintiff and the defendant, owner of the ship *Emma*, it was agreed that the ship should sail and proceed in ballast to a safe and convenient port near to Cape Town, and there load a full cargo of merchandise, and therewith proceed to Cork or Falmouth; and the plaintiff agreed to load the said vessel with the said cargo, and to pay freight for the same to the defendant, &c. The declaration then averred, that although the plaintiff was ready and willing to appoint and put on board the ship a fit and proper person as supercargo, to take care of the merchandise to be loaded on board the said ship, to indicate and make known, and which supercargo would have indicated and made known, to the master of the ship, a safe and convenient port near Cape Town for receiving on board such cargo of merchandise, yet the defendant did not nor would suffer or permit the said ship to proceed in ballast on the said intended voyage, &c.

General demurrer and joinder.

The principal point stated for argument by the defendant was, that the declaration was defective and bad, in omitting to state, either that the plaintiff gave notice to the defendant of a safe and convenient port near Cape Town, to which the ship was to proceed, or any thing equivalent in law to such notice.

Crowder, in support of the demurrer. The question in this case is, whether it is not a condition precedent to the right of action on this charter-party, that the charterer should have indicated a safe and con-

¹ Compare *Brooklyn v. Brooklyn City R. R. Co.*, 47 N. Y. 475.—ED.

venient port to which the ship might proceed to take in her cargo, and whether what is averred in this declaration, as to the appointment of a supercargo, is sufficient. It is submitted that it is not. It is of the utmost importance that the owner of the vessel should know, before the commencement of the voyage, whither she is going. The plaintiff does not state that he gave him that information; he avers, indeed, that he did something else instead, but he does not state that that was assented to by the defendant. If he had alleged that it was agreed between the parties that the indication of a port by the supercargo should be sufficient, that might have entitled him to sue; but the charter-party does not provide for that. There is no provision for the maintenance of a supercargo. That which by the charter-party is a condition precedent to the defendant's liability is not averred. [PARKE, B. The only question is, whether the owner may not be bound to go to a safe port selected by himself.] The selection of the merchandise must be by the shipper; and so the plaintiff has considered it in framing his declaration.

Tomlinson, contra. If the defendant was bound to go to a safe port selected by himself, the plaintiff is entitled to recover; but it must be admitted that the contract was not so understood by either party, but that the plaintiff had the option of naming the port. It is submitted, however, that from the whole of the charter-party it appears that the plaintiff was to go out, and have the control of the cargo; and, if so, that the averment as to the supercargo would be sufficient. The charter-party does not name or allude to any agents of the plaintiff at the port near Cape Town. The plaintiff personally undertakes to load the vessel with a cargo. On the other hand, agents of the plaintiff at London and Liverpool are expressly named for the return cargo. There is no allegation that the defendant asked the plaintiff to name a port; and there are many things to be done which must be done either by the charterer himself or by a supercargo. The calling for orders rather imports the latter.

POLLOCK, C. B. I think this is a perfectly clear case. Calling to our assistance our knowledge of mercantile matters, it seems to me that the port to which the vessel was to proceed was to be selected by the charterer, and not by the owner. It is admitted, that it is either to be named by him, or that he is to send somebody with the vessel to name it. But, if it was to be the latter, there should have been a stipulation to that effect in the charter-party.

PARKE, B. My only doubt arose from the omission of the charter-party to state whether the option of selecting the port was to be with the charterer or the owner. But, looking at the whole of it, I think the port was to be selected by the plaintiff, the charterer; therefore it should either have been named before the ship sailed, or there should have been an express stipulation for its being named afterwards. So, if it was intended that a supercargo should go for that purpose, there should have been an express stipulation to that effect. In the absence

of any such agreement, the charterer is the party to select the port. The declaration, therefore, is bad for want of an averment that he selected a safe port, and gave notice thereof to the defendant.

ALDERSON, B. I am of the same opinion. It is clear that the charterer is the person to name the port, because he is to provide the cargo. How could he provide a cargo from all the places which the other party might choose to go to?

ROLFE, B., concurred.

Judgment for the defendant.

OLLIVE v. BOOKER.

IN THE EXCHEQUER, NOVEMBER 13, 1847.

[*Reported in 1 Exchequer Reports, 416.*]

ASSUMPSIT to recover damages for breach of a contract of charter-party, which was in the following terms: "London, 24th December, 1844. Charter-party. It is this day mutually agreed between Messrs. Ollive, Nephew, & Co., original charterers of the good ship or vessel called the Dove, A 1, of the measurement of 149 tons or thereabouts, now at sea, having sailed three weeks ago, and Messrs. Booker & Co., merchants, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall with all convenient speed sail and proceed to Marseilles (after having delivered her cargo at Genoa for ship's account), or so near thereunto as she may safely get, and there load from the factors of the said charterers a full cargo of linseed or other goods, which the said merchants bind themselves to ship, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; and, being so loaded, shall therewith proceed to one safe port in the United Kingdom, calling at Cork or Falmouth for orders, which are to be given in due course of post, or so near thereunto as she may get, and deliver the same on being paid freight at and after the rate of 5s. 6d. per imperial quarter for linseed, or other goods in full proportion, according to the London printed rates delivered, the act of God, restraints of princes and rulers, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, during the said voyage, always excepted. The freight to be paid on unloading and right delivery of the cargo, one-third in cash, and the remainder by an approved bill on London at three months' date. Thirty working days are to be allowed, Sundays excepted, the said merchant (if the ship is not sooner despatched) for loading the said ship at Marseilles, and unloading at the return port; mats and bulkheads to be found by the charterers, and dunnage by the ship, and ——— days on demurrage, over and above the said laying days, at 4l.

per day; the penalty for the non-performance of this agreement, 400*l.*; the vessel to be consigned to the freighters' agents at Marseilles; cash for usual disbursements at Marseilles, free of interest and commission but the insurance. Bills of lading to be signed for more or less freight, without prejudice to the charter-party. Per proc. Booker & Co., Thomas Booker, jun.; Ed. Ollive, Nephew, & Co.; John Aitkin, witness to the signature of Messrs. Booker & Co., and of Messrs. Ed. Ollive & Co. The commission on this charter-party is at 5*l.* per cent, due ship lost or not lost. The vessel to be addressed to Alexander Howden or his agents at the port of discharge."

The first count of the declaration, after setting forth the provisions of the charter-party, averred mutual promises, and performance on the part of the plaintiff, and assigned as a breach that "the defendant did not nor would, within the space of the said thirty working days in the said last-mentioned charter-party, ship a full cargo of linseed or other goods, according to the terms of the said last-mentioned charter-party, in or on board the said ship or vessel, according to the tenor and effect of the said last-mentioned charter-party and of his said promise aforesaid, but on the contrary the defendant both neglected," &c.

The eighth plea to the first count, after setting out the charter-party verbatim, proceeded as follows: And the defendant avers that upon the making of the said charter-party, time was an essential and material part of the contract, and that the probable situation of the vessel, with reference to the date of her sailing, was also a material and essential part of the contract, to wit, with reference to the object of the said voyage and the distance of the said port of Marseilles, and the nature of the said intended cargo and the time of year at which the said charter-party was made. And the defendant further says, that in point of fact at the time of the making of the said charter-party the said vessel had not sailed three weeks before, but on the contrary had sailed at a materially and unreasonably later time, to wit, one week later, which the plaintiff at the time of the making of the said charter-party knew, and whereof the defendant had no notice or knowledge; wherefore the defendant wholly declined to accept or employ the said vessel under the said charter-party, to wit, immediately upon learning and knowing that the said vessel had not sailed as in the said charter-party set forth, to wit, upon the 1st of February, 1815, and wholly neglected and refused to load any cargo on board her, to wit, upon the day and year last aforesaid, as he lawfully might for the cause aforesaid. Verification. Replication, *de injuria*.¹

At the trial, at the Sittings after last Hilary Term, before the Lord Chief Baron, a verdict was found for the plaintiff upon all the issues, except those raised by the eighth, ninth, and eleventh pleas, and upon these issues the defendant had a verdict; leave being reserved to the plaintiff to move to enter a verdict upon them also.

¹ The statement of the pleadings has been materially abbreviated. — ED.

Crowder having obtained a rule *nisi* accordingly, and also for judgment *non obstante veredicto* upon the eighth plea.¹

Watson and *Greenwood* now showed cause. The plaintiff is not entitled to judgment *non obstante veredicto* upon the eighth plea. The statement in the charter-party, that the vessel was then at sea, and had sailed three weeks, is an essential and most material part of the contract, and was not a mere collateral agreement, for the breach of which an action should have been brought to recover any consequential damages. The defendant was not bound to complete his part of the engagement, as this condition was not performed by the plaintiff. The time at which a vessel sails is a most important matter in contracts of affreightment. This is a term which forms the basis of the contract. The case of *Glaholm v. Hays* is a direct authority upon this very point. The words in that charter-party were these: "The vessel to sail from England on or before the 4th of February next," and it was held that the sailing of the vessel on or before that day was a condition precedent. The stipulation in that and the present case is the same; there the vessel was "to sail," here it is affirmed that it "had sailed" at a certain time. The judgment of the Court in *Glaholm v. Hays* is most material, as laying down the principles for the government of the present question. Tindal, C. J., there says: "It cannot depend, as Lord Ellenborough observes, on any formal arrangement of the words, but (must depend) on the reason and sense of the thing as it is to be collected from the whole contract." And in a subsequent part of the judgment, the whole of which is applicable to the present case, his Lordship proceeds: "Both parties were aware that the whole success of a mercantile adventure, does, in ordinary cases, depend upon the commencement of the voyage by a given time. The nature of the commodity to be imported, the state of the foreign and home market at the time the contract of charter-party is made, and the various other calculations which enter into commercial speculations, all combine to show that despatch and certainty are of the very first importance to their success; and certainly nothing will so effectually secure both despatch and certainty, as the knowledge that the obligation of the contract itself shall be made to depend upon the actual performance of the stipulation which relates to them." That doctrine governs the present case. The Lord Chief Justice then distinguishes cases where the cargo had arrived; and the objection, being made at that time, was too late. In *Freeman v. Taylor*, which was an action on a charter-party, the defendant had refused to find a cargo in consequence of deviation. Tindal, C. J., there said, in the course of his direction to the jury: "If the deviation was so long and unreasonable that in the ordinary course of mercantile concerns it might be said to put an end to the whole object the freighter

¹ The argument upon that part of the rule relating to the issues upon the 9th and 11th pleas depended upon the facts, and is omitted. *Watson*, on the part of the defendant, had obtained a cross-rule to enter a nonsuit upon the plea of *non-assumpsit* which was argued immediately after the present case, and was discharged.

had in view in chartering the ship, in that case the contract might be considered at an end." The Court held this direction right. It is a condition in contracts on charter-parties, that the time at which a vessel shall sail shall either be a reasonable time, or the time which is stipulated. *M'Andrew v. Adams*.¹ In cases where an article is warranted, a person is not bound to accept it, unless it comply with the warranty. The time of the vessel's sailing is as much a condition of the charter-party as that she was staunch and strong. (They were then stopped by the Court.)

Crowder and *Bovill* in support of the rule. This plea affords no answer to the action. The statement in the charter-party, upon which the plea is founded, is a mere representation, and not a condition. The plaintiff might be liable for the breach of it in a cross-action. The statement is treated as a representation in the plea, which alleges that the plaintiff, at the time the contract was completed, knew that the said vessel had not sailed three weeks before, but a materially and unreasonably later time. The case of *Glaholm v. Hays* is distinguishable from the present; there it was agreed (after several stipulations), "the vessel to sail on or before a certain day." The very position of the words distinguishes the two cases, and the time there was future; here it was past. If the word "warrant" had been in the clause, the question would have been different. In *Glaholm v. Hays*, Tindal, C. J., says: "The very words themselves, 'to sail on or before a given day,' do, by common usage, import the same as 'conditioned to sail,' or 'warranted to sail on or before such a day.'" *Freeman v. Taylor* is not like the present case, the question there being with respect to deviation. There is no statement in this plea that the defendant received any prejudice from the time when the vessel sailed. It is established, that, if a matter in a covenant goes to part only of the consideration, the breach of it is only a ground for a cross-action.²

PARKE, B. I am of opinion that the rule for judgment *non obstante veredicto* on the eighth plea ought to be discharged. It seems to me that the averment in the plea, that at the time of entering into the charter-party the plaintiff knew that the vessel had sailed a materially and unreasonably later time than that which was stipulated for, is an immaterial averment, and might be struck out. The main question, however, in the construction of this plea, is, whether the allegation in the charter-party, of the vessel being "now at sea, having sailed three weeks ago," is a warranty or a representation. In the construction of agreements, as in the case of contracts under seal, we should endeavor to discover the intention of the parties. Here it is stated that the vessel was now at sea, having sailed three weeks; and, if time is of the essence of the contract, no doubt it is a warranty and not a representation. Such also is the case in policies of insurance. It appears to me that it is a warranty, and not a representation, that the vessel had

¹ 1 Bing. N. C. 29.

² *Stavers v. Curling*, 3 Bing. N. C. 355.

sailed three weeks. It is, therefore, a condition precedent. The rule depends upon each particular contract, and here time was of the essence of the contract, as much so as the statement that she was a sound vessel. This being a condition precedent, and not performed, the defendant was not bound to load the vessel. If he had loaded her, the breach of the condition would have been waived, and he would have been liable for the full freight. I entirely agree with the reasoning of Tindal, C. J., in the case of *Glaholm v. Hays*, which I think applies to the present case. There the stipulation was held to be a condition precedent. The defendant was entitled to say that he was not bound to load the vessel, as the condition had not been performed, and that the case was the same as if the vessel had not proved to be A 1, as she was warranted to be. I think, therefore, that the plea affords a good answer, and that the rule for judgment *non obstante veredicto* ought to be discharged.

ALDERSON, B. I am of the same opinion. The words which describe the ship as being A 1 amount to a warranty, and the statement that she had sailed for three weeks is equally so. The question, whether these words amount to a condition precedent has been decided by *Glaholm v. Hays*; the reasonings there are applicable to the present case, and I am unable to distinguish the two cases.

ROLFE, B. I am of the same opinion. The stipulation in the present case is not collateral matter, but is a part of the contract. I agree with the rest of the Court, that the case in the Common Pleas governs this. There the stipulation was that the vessel should sail, but that makes no difference. The condition was founded upon the object that she should load her cargo in a certain time; and if it had been that she should load in six weeks, that being the length of the voyage, that would be the same as a condition that she should load in the ordinary time, of which she had already been three weeks at sea. I think the case is governed by that in the Common Pleas, which is consistent with common sense and reason. The rule, therefore, for judgment *non obstante veredicto* must be discharged.

Rule discharged.

OLIVER v. FIELDEN AND OTHERS.

IN THE EXCHEQUER, MAY 30, 1849.

[*Reported in 4 Exchequer Reports, 135.*]

ASSUMPSIT. The declaration stated, that by a memorandum of charter, made the 28th of March, 1848, by the plaintiff, therein described to be agent for the owners of the ship called the *Lydia*, then on the stocks, of the admeasurement of 1,100 tons or thereabouts, then at Quebec, to be launched and ready to receive cargo in all May, A.D.

1848, guaranteed by the owners to sail in all June, A.D. 1848, and the defendants, therein described as Messrs. Fielden & Co., merchants, of the other part, it was mutually agreed between the plaintiff and defendants that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, should with all convenient speed there load, from the factors of the said merchants, a full and complete cargo of timber, including deck load, as follows : — The charterer having the option of shipping 200 to 250 loads of red pine, &c. ; and being so loaded, should therewith proceed to Liverpool, or so near thereunto as she might safely get, and deliver the same, on being paid freight as follows, &c. (The declaration then set out the usual exception of dangers of the seas, and stipulation as to demurrage, and alleged mutual promises and performance on the plaintiff's part.) Averment: that the ship, in a proper and reasonable time in that behalf, to wit, on, &c., being tight, staunch, and strong, and every way fitted for the voyage, was ready to receive such cargo, having been theretofore launched, and that she was so ready, as aforesaid, in such a time as that she could and would have sailed, and the plaintiff says that the said ship could and would have sailed, on the voyage aforesaid, in June aforesaid, if the defendants had provided such cargo as aforesaid. And that, during the time aforesaid, and during the whole of the laying days and days of demurrage in the memorandum of charter mentioned, the plaintiff, at Quebec aforesaid, was ready and willing to receive on board the said ship, from the factors of the defendants, such a full and complete cargo of timber, including deck load, as in the said memorandum of charter in that behalf mentioned, according to the terms of the said memorandum of charter, &c. Yet the defendants did not, nor would, during the said month of June, or at any time whatsoever, provide for the said ship, or load on the said ship, such a full and complete cargo of timber, including deck load, as in the memorandum of charter mentioned, but wholly refused so to do, &c.

Plea : that the said memorandum of charter was and is made in words and figures following (the plea set out the charter *verbatim*, the material part of which is as follows) : — It is this day mutually agreed between Edward Oliver, agent for the owners of the good ship or vessel called the *Lydia*, new ship, now on the stocks, of the measurement of 1,100 tons or thereabouts, now at Quebec, to be launched and ready to receive cargo in all May, guaranteed by the owners to sail in all June ; and Messrs. Fielden & Co., merchants, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall with all convenient speed sail and proceed to, &c., or so near thereunto as she may safely get, and there load, from the factors of the said merchant, a full and complete cargo of timber, including deck load, as follows : — The charterer having the option of shipping 200 to 250 loads of red pine, &c. Averments: that the month of May, in the charter-party mentioned, was meant to be, and was, the month of May, 1848 ; and that the said ship was not launched and ready to receive cargo in all May, 1848. Verification.

General demurrer and joinder therein.

Crompton in support of the demurrer. The being ready to receive cargo in May was not a condition precedent to the plaintiff's right to recover. The terms "ready to receive cargo in all May," mean only that the parties expected that the ship would be ready at that time. The next clause, "guaranteed by the owners to sail in all June," excludes any other construction. The doctrine as to conditions precedent attaches only where the whole adventure is destroyed; if the failure goes to part of the consideration merely, the remedy is by a cross-action. That view is supported by the judgment of Tindal, C. J., in *Glaholm v. Hays*, where this subject was much considered. In *Constable v. Cloberie*, it was held that a breach of the covenant to sail with the next wind was no answer to an action for freight. In *Stavers v. Curling*, the plaintiff, a captain of a South Sea whaler, covenanted with defendants that he would proceed to the fishery and procure a cargo of sperm oil, and would return to London, and then, at his own costs, deliver it to the defendants, who covenanted, on the performance of the before-mentioned terms on the part of the plaintiff, to pay him a certain proportion of the net proceeds of the cargo; and it was held, that the plaintiff's covenants were independent, and consequently the performance of them not a condition precedent to an action on the defendant's covenant. *Ollive v. Booker* is distinguishable, for there the defendant pleaded that time was an essential and material part of the contract.

Aspland appeared to argue in support of the plea, but was not called upon.

POLLOCK, C. B. There must be judgment for the defendants. The stipulation as to the vessel being ready to receive a cargo in May is not mere description, but part of the contract, and forms a condition precedent to the plaintiff's right to recover.

ALDERSON, B. I am of the same opinion. The plaintiff avers that he was ready and willing to receive a cargo according to the terms of the charter-party. One of those terms, and a very important one, was that the vessel should be ready to receive a cargo in May.

ROLFE, B. The cases of *Glaholm v. Hays* and *Ollive v. Booker* are conclusive in favor of the defendants.

PLATT, B. In *Constable v. Cloberie*, the vessel had actually carried the goods.

*Judgment for the defendants.*¹

¹ And see *Weisser v. Maitland*, 3 Sandf. 318, to the same effect. — ED.

ARMITAGE v. INSOLE AND ANOTHER.

IN THE QUEEN'S BENCH, FEBRUARY 5, 1850.

[Reported in 14 *Queen's Bench Reports*, 728.]

ASSUMPSIT on an agreement, whereby plaintiff agreed to conduct the sale and disposal of the defendants' coals, to carry out their instructions, promote their interests, and extend their connection, to the utmost of his ability and power, throughout Ireland, for three years from 1st of January then next, and for that purpose to visit certain places in Ireland at stated times in each year; and defendants agreed to engage the services of the plaintiff as above described for three years, and to pay him the yearly sum of 120*l.*, namely, 60*l.* every 1st day of July and 1st day of January, from the date thereof. And defendants further agreed to give yearly free to the plaintiff during the said three years twenty tons of coals, to be put free on board ship at Cardiff for the use of the plaintiff, in lieu of all charges for stationery, and so forth.

The declaration, after alleging mutual promises, and performance by the plaintiff of the conditions precedent on his part, as far as was necessary to support the breaches for discharging him from his employment by the defendants under the contract, and for their refusing to pay him the salary agreed on, assigned a further breach as follows: Nor did nor would the defendants give to the plaintiff yearly, or at any time during the said period of three years, twenty tons of coals, or any coals whatever, free on board ship at Cardiff, for the use of the plaintiff; but, on the contrary thereof, they, the defendants, wholly neglected and refused so to do, and have not at any time delivered or given to the plaintiff, at Cardiff or elsewhere, any coals whatever, and there is now due and owing from the defendants to the plaintiff, under the said agreement, a large quantity, viz., sixty tons of coals, the same being of great value, viz., 24*l.*

Demurrer. Joinder.

Mellish, for the defendants. This is a demurrer to part only of the breach, but the defendants are entitled to judgment, although the residue of the breach is sufficiently assigned. *Lush v. Russell*.¹ The defendants agree "to give yearly free to the plaintiff during the said three years twenty tons of coals, to be put free on board ship at Cardiff, for the use of the plaintiff." The ship then must be selected, and its destination fixed, before this part of the contract can be complied with. The agreement is silent on the subject; but it is clear that the port must be first selected either by the plaintiff or the defendants. But it is the duty of the plaintiff to select the ship and the port of discharge,

¹ 4 Exch. 637.

as, until that is done, the defendants cannot comply with the contract by delivering the coals free on board. It is therefore a condition precedent to be performed by the plaintiff; and he should have averred that he was ready and willing to accept the coals, and that he had given the defendants notice thereof, and had named a ship and the port at which they were to be delivered. *Rae v. Hackett*.

A. I. Johnston, contra. There is no condition precedent necessary to be noticed by the plaintiff. *Reade v. Meniaeff*¹ shows the general principle, that contracts of this kind should not be construed narrowly. The substance of the contract was that the plaintiff should have the coals. The defendants would be at liberty to deliver them at any time within the year, even if a request had been made by the plaintiff. *Startup v. Macdonald*.² But notice ought to have come from the defendants that they were ready to give the coals on the plaintiff naming the ship. Something was to be done at a time to be ascertained by the defendants. He then referred to *Heron v. Treyne*,³ and *Halling's case*.⁴ The plaintiff's readiness to accept the coals was a condition subsequent to notice by the defendants that they were ready to deliver them. *Hudson v. Haslam*.⁵

PATESON, J. The contract clearly shows a duty cast on the plaintiff to name the ship at some time or other; but, it is argued, not until the defendants have given notice of their readiness to supply the coals, because no time is fixed for the delivery. If "yearly" mean at the end of the year, then the time is fixed, and the plaintiff should have named a ship at that time. Perhaps that is the meaning of the contract. But, if otherwise, and if the defendants could call upon the plaintiff at any time during the year to accept the coals upon reasonable notice (for notice must be reasonable), even then the plaintiff must have named the ship, and should have averred that he was ready and willing to accept the coals, and that he had a ship ready to receive them.

COLERIDGE, J. I am of the same opinion. Where circumstances, left uncertain by the contract, are of such a nature that one party cannot perform his part of the contract until they are fixed, the other party, insisting on the contract, ought to fix those particulars. Here both time and place should have been fixed by the plaintiff; but certainly place.

WIGHTMAN, J. The main difficulty arises from the uncertainty of the time when the coals are to be put on board. I should say, the agreement being silent as to time, that it must be at the option of the plaintiff. But however that may be, the defendants clearly cannot give the coals free on board, until they know the ship, and at what port it is to discharge. Whatever, therefore, the construction of the agreement may be as to time, the plaintiff must fail for want of averring that he was ready and willing to name a ship.

Judgment for defendants.

¹ 7 Com. B. 152, 161.

² 6 M. & G. 593.

³ 2 Ld. Raym. 750.

⁴ 5 Rep. 22 b.

⁵ 7 Com. B. 825, 833.

NEALE v. RATCLIFF AND ANOTHER.

IN THE QUEEN'S BENCH, JULY 6, 1850.

[Reported in 15 Queen's Bench Reports, 916.]

ASSUMPSIT. The declaration stated that, heretofore, to wit, on the 10th May, 1845, in consideration that defendants, at their request, had become and were tenants to plaintiff of certain premises, with the appurtenances, of the plaintiff, to wit, a messuage or public house called the Swan Inn, situate, &c., together with the house and stable and other outbuildings thereto belonging, upon and subject to the terms that the defendants should maintain and keep in good tenantable repair and condition the said messuage or public house, buildings, and premises, the same being first put into good tenantable repair and condition by the plaintiff, and should deliver up the same in such repair and condition at the expiration of their said tenancy, defendants then promised plaintiff to maintain and keep in good tenantable repair and condition the said messuage or public house, buildings, and premises, the same being first put into such repair and condition by the plaintiff, and that defendants would deliver up the same in such repair, &c., at the expiration of their said tenancy: And although such tenancy continued from thence, to wit, until 11th October, 1847, and although plaintiff, after the making of the said promise, and during the continuance of the said tenancy, and before the breach of promise, &c., after mentioned, to wit, on the day and year first aforesaid, did first put the said messuage or public house, buildings, and premises, into good tenantable repair and condition, whereof defendants then had notice, yet defendants did not nor would afterwards and during such tenancy maintain or keep the said messuage or public house, buildings, and premises, or any part thereof, in good tenantable repair or condition, or deliver up the same in such repair, &c., at the expiration, &c.; and defendants afterwards, at the expiration of the said tenancy, which happened before the commencement of this suit, to wit, on, &c., wrongfully delivered up the said messuage, public house, buildings, and premises in bad and untenable repair, &c., and greatly dilapidated, &c., for want of such repair as aforesaid, contrary to their said promise; and thereby, &c. (damage to plaintiff by expense of repair, &c.).

Particular of demand: 50*l.* for dilapidations and non-repair of the premises mentioned in the declaration, and for the bad order and condition in which defendants left the same.

Pleas: 1. Non-assumpsit. 2. That defendants had not become nor were the tenants to plaintiff, &c., in manner, &c. 3. That plaintiff did not first put the said messuage, buildings, and premises in the declaration in that behalf mentioned into good tenantable repair and condition, in manner, &c. 4. That defendants did during the said tenancy

maintain and keep the said premises in good tenantable repair and condition, and did deliver up the same in such repair and condition at the expiration of the said tenancy, according to the tenor, &c., of their said promise in that behalf. Issues to the country were joined on the several pleas.

On the trial, before Wilde, C. J., at the Norfolk Summer Assizes, 1849, the following agreement was put in, dated May 10, 1845, between plaintiff of the one part and defendants of the other.

"Articles," &c. "Whereby the said William Neale doth agree to let to the said Francis Ratcliff and Robert Reid, who do agree to hire of him, all that messuage or public house called the Swan Inn," situate, &c., "together with the barn, stable, and other out-buildings, and all the appurtenances thereto belonging, as the same are now in the occupation of the said F. R. and R. R. or their undertenant; from the 11th day of October, now last past, for one year thence next ensuing, and so on from year to year, so long as the said parties shall mutually agree; determinable," &c.; "at and under the clear yearly rent of 41*l.*, payable," &c. "And the said F. R. and R. R. do hereby agree with the said William Neale that they the said F. R. and R. R., or one of them, will pay unto the said W. N., his heirs or assigns, the said rent," &c.; "and also shall and will pay and discharge all the rates, taxes," &c.; "and also shall and will maintain and keep in good tenantable repair and condition the said messuage or public house, buildings, and premises, the same being first put into good tenantable repair and condition by the said William Neale, and in such repair and condition deliver up the same at the expiration of this agreement. In witness," &c.

It appeared in evidence that the plaintiff had done repairs to some parts of the premises before the alleged breach, but had not repaired the whole. It was proved also that the defendants had omitted to repair, both in those parts which had been repaired by the plaintiff, and in those which had not. The Lord Chief Justice left it to the jury to say, whether the plaintiff had at first put the premises into a tenantable state of repair, and whether the defendants had left them in such tenantable state. The jury were of opinion that the plaintiff had not put the whole premises into tenantable repair; and that the defendants had omitted to repair in parts which the plaintiff had repaired under the agreement. They found a verdict for the plaintiff on the first two issues; on the third issue they found a verdict for defendants as to part and for plaintiff as to part; and on the fourth for plaintiff as to so much as he had put in repair; for defendants as to the residue. Damages on the fourth issue 20*l.* Leave was reserved to the defendants to move to enter the verdict wholly for them on the third issue.

Palmer, in Michaelmas Term, 1849, moved for judgment *non obstante veredicto* on the third issue. The landlord's contract to repair was not a condition precedent, but an independent covenant; although, therefore, he may have broken it, wholly or in part, he may still recover for the breach committed by the defendants. [ERLE, J. You say that the

landlord, omitting to put the premises in repair, might sue the tenant for that very non-repair.] The words must be looked to and construed according to the intention of the parties. They clearly meant to frame independent covenants, and not that the landlord's should be a condition precedent. [ERLE, J., mentioned *Thomas v. Cadwallader*.] There the lessee could not repair until the timber was assigned to him for repairs. There are mutual remedies here on the respective agreements; the performance of the landlord's, therefore, was not such a previous condition that the fulfilment of it was necessary to his right to recover: Com. Dig. "Pleader," (C. 56.) [WIGHTMAN, J. Your agreement here is a qualification upon that of the tenant; he is to keep in repair the premises which have been put in repair by you. COLERIDGE, J. The tenant is to repair the messuage and buildings, "the same being first put into" good repair by the landlord.] This case ought to be decided on the principles applied in *Stavers v. Curling*, namely, that a condition precedent is not to be inferred against the intention of the parties; and that, where the covenant does not go to the whole of the consideration, it is not a condition precedent, but only the ground of a remedy in proportion to the actual injury. *Ritchie v. Atkinson*¹ and *Boone v. Eyre* are also authorities on this latter point. [WIGHTMAN, J. Would it have been a good replication here that you had put part in repair?] It would. In *Cannock v. Jones*,² by agreement between lessor and lessee of a farm house and buildings, the lessee agreed to do certain repairs, &c., "the said farm house and buildings being previously put in repair, and kept in repair," by the lessor, and the lessor's promise was held to be an independent covenant. [WIGHTMAN, J. The action there was brought by the lessee upon the lessor's promise; and the question was whether or not that amounted to a covenant.] It could not be both an independent covenant for the purpose of such an action, and also a condition precedent. [WIGHTMAN, J. Have you any authority for that?] There is none for the opposite proposition. If the fulfilment of the plaintiff's promise here was not a condition precedent, he is entitled at least to keep the verdict given for him on the third issue, and in any view of the case he ought to retain his damages on the fourth.

Cur. adv. vult.

O'Malley, on the same day, moved to enter the verdict wholly for the defendants on the third issue. He cited *Thomas v. Cadwallader*, *Sinclair v. Bowles*,³ and *Coombe v. Greene*.

Cur. adv. vult.

COLERIDGE, J., in the same Term (November 16), delivered the judgment of the Court. After mentioning the cross-motions his lordship said:

The action was by landlord against tenant for non-repair. The

¹ See *Mills v. Blackall*, 11 Q. B. 358.

² 3 Exch. 233, affirmed in Exch. C., *Jones v. Cannock*, 6 Exch. 713.

³ 9 B. & C. 92.

premises were let under an agreement, by one clause of which the defendants were bound to maintain and keep the premises in repair, "the same being first put into good tenantable repair" by the plaintiff. The third plea denied that the plaintiff had put the premises into tenantable repair. It appeared that the premises were a public house and outbuildings; the plaintiff had repaired the latter, not the former; but the defendants had neglected to keep the latter in repair; and they assessed the damages for this at 20%. The plaintiff contended that his obligation to put in repair was an independent covenant, and not a condition precedent to his right to call on the defendants to perform their agreement; or at all events that it was divisible, and that he was entitled to damages for the non-repair of that part which he had previously put in repair. The defendants controverted both propositions, and therefore contended that, as the plaintiff had not put the whole premises in repair, he could not recover damages for the non-repair of any part. We are of opinion that this was a condition precedent, and that the case is distinguishable from *Cannock v. Jones*.¹ This disposes of the plaintiff's application; but we think, as the pleadings are framed, that the defendants should have a rule.

Rule nisi granted to defendants. Refused to plaintiff.

In this Vacation, June 22,

Palmer and Worlledge showed cause. The question is, whether a repair of the whole premises demised was a condition precedent to recovery for non-repair of any part. The stipulations were independent, and the subject of independent remedies. *Dicker v. Jackson* is a recent authority in favor of the plaintiff's construction. The rule of interpretation in such cases is laid down by *Tindal, C. J.*, in *Stavers v. Curling*. [WIGHTMAN, J. You must argue here that the plaintiff might recover, though he had never put any part of the premises into repair.] Here a part was put into repair, and was not kept in repair by the defendants; and the verdict is taken as to that part only. To make performance in every particular a condition precedent would lead to the same extravagance of construction which was pointed out in *Boone v. Eyre*, commented upon, among other authorities, in note (4) to *Pordage v. Cole*.² In *Macintosh v. Midland Counties Railway Company*³ the plaintiff had covenanted to complete part of a railway within a certain time for a specified sum, he being provided by the defendants with rails and chairs, &c.; in an action for non-payment, the defendants insisted on a penalty incurred according to the contract, by not completing the work within the stipulated time; the plaintiff denied owing the penal sum, and, in support of his case, proved that he had not been properly supplied with rails, &c., which, he contended, was a condition precedent to the accruing of the penalty. But the Court said: "The covenant on the plaintiff's part is absolute, to complete on a given day,

¹ See *Friar v. Grey*, 15 Q. B. 891, and *Grey v. Friar*, 15 Q. B. 901.

² 1 Wms. Saund. 320 a.

³ 14 M. & W. 548.

or to pay 300*l.* daily if he does not. Any other construction would lead to the conclusion, which we think an unreasonable one, that the non-supply of a single rail or chair by the time specified for its delivery, although in the result wholly immaterial to the facilities for completion, would entitle the plaintiff to receive the 15,000*l.* given for expedition money, without his giving the expedition for it. On the other hand, by treating the covenants as independent, it is open to the plaintiff, if he has really been prevented from completing the railway in due time by the defendants' neglect, to bring his action against them for that breach of their covenant." Here, according to the argument on the other side, if one hovel was unrepaired by the plaintiff, any other building, though entirely reinstated by him might be left in decay by the defendants. They entered under the agreement, acquiescing in the partial performance. The landlord's remedy accrued from that time to the extent of their whole undertaking. It may perhaps be argued that the third issue here involves the whole premises; the words of the plea being, "did not first put the said messuage, buildings, and premises into good, tenantable repair." But the issue is distributable; and, if the proof given by the plaintiff be less extensive than his averment, the proof may be applied to the issue *pro tanto*. *Tapley v. Wainwright*,¹ *Wood v. Peyton*.² It was not essential to aver that the plaintiff did not repair the buildings, &c., or any part of them, more than it is to rejoin in support of a plea of infancy in assumpsit that goods supplied to the infant were not, nor were any part of them, necessities; the plaintiff, therefore, in traversing the averment, does not undertake to disprove it to its full extent. The cases cited in moving for the rule show merely that the contract on one side may, by its nature, be a condition precedent; which it is unnecessary to dispute.

O'Malley and Couch, contra. The defendants are entitled to succeed on the whole issue. There is no instance in which a condition has been apportioned in the manner contended for here. That the courts have thought this impracticable is proved by the anxiety they have shown in many instances to construe stipulations as independent covenants, thus avoiding the hardship, otherwise inevitable, that a covenant on one side could not be enforced, because some portion, however minute, of a condition precedent was unfulfilled on the other; *Macintosh v. Midland Counties Railway Company* is an example. The hardship, if any, here, is that which the plaintiff has imposed upon himself. And the same complaint might be made on either side. Suppose the landlord puts in repair only a single window, or some part of the building which is of little use to the tenant, and leaves every thing else in decay, it may be asked, whether the tenant is liable for not doing all the repairs. In *Slater v. Stone*, the Court held that a covenant by tenant to repair premises "*ab et post*

¹ 5 B. & Ad. 395.

² 13 M. & W. 30.

reparationem" by the landlord, was conditional, and that a declaration on the covenant, alleging as a breach non-repair by the tenant of a part specified, with an allegation that, at the time of the demise and the beginning of the term, the part was in good repair, without adding "*ab et post*," &c., was bad. The position that the tenant ought at least to repair what has been put in repair by the landlord would be very difficult of application, where partial repairs had been done in a number of places. The issue on the plaintiff's part is, that he did first put the said messuage, buildings, and premises in the declaration in that behalf mentioned into good repair. A verdict cannot be entered for him on such an issue, upon proof that he first repaired some part only. If so entered, it would be conclusive in his favor as to the whole in a subsequent action. [WIGHTMAN, J. The finding here would prevent that, if the contract is divisible.] But further, this is an action of assumpsit; and the consideration stated is that the defendants had become tenants to the plaintiff on certain terms, which are stated. If the terms are that the plaintiff shall put, not "the same" messuage and premises, but some part of them, into repair, a different consideration is proved from that declared upon, and the variance is fatal; for the terms, taken as a whole, are the consideration: *Beech v. White*; ¹ and the plaintiff's promise is entire, and cannot be apportioned: *Thomas v. Williams*, ² *Head v. Baldrey*. ³ [WIGHTMAN, J. You contend that the putting every part in repair is the consideration for repairing each part.] That is the plaintiff's contract.

Cur. adv. vult.

WIGHTMAN, J., now delivered the judgment of the Court. After stating the substance of the declaration, and the third issue, his Lordship said:—

The jury found on this issue that the plaintiff had not put all the demised premises into repair, but part only; that the defendants had not kept that part in repair; and assessed the damages for the non-repair of that part at 20*l*.

There were cross-rules applied for; but the questions raised were discussed on that applied for by the defendants, namely, to enter the verdict for them on this issue; and two grounds were relied on: the first, that the obligation on the landlord to put in repair was a condition precedent to the tenant's obligation to keep in repair, to which we all agreed on the argument; the second, that, being a condition precedent, it was not divisible, and therefore that a part performance would not enable the plaintiff to recover as to that part. And upon consideration, we think the defendants are right in this also.

We do not mean to lay down that in no case may a condition precedent be divisible. Cases may easily be conceived in which the covenant or agreement to which it is attached may apply to two or

¹ 12 A. & E. 668.

² 10 B. & C. 664, 671.

³ 6 A. & E. 459.

more subject-matters, so distinct that the covenant or agreement, which is one in form, is several in fact; and the condition, in the same way attached to each, is several in fact, though one in form; and in such case it may be clear that, by the intention of the parties, *reddendo singula singulis*, the performance as to one part may entitle to an action for the non-performance of the corresponding part of the covenant. But the burden of showing this will clearly lie on the party who insists upon it, and who seeks to make that divisible which on its face is entire. Now, in the present instance, we see no ground for concluding this to have been the case. The defendants have taken, not two separate dwelling-houses, of which one may be completely enjoyed, though the other may not be in a condition for proper occupation, but they have taken a dwelling-house with appurtenant out-buildings; they have insisted that they shall not be bound to keep in repair till the landlord has put into repair; the performance of this by him is the consideration for the keeping in repair by them; and it seems to us that the unrebutted presumption is, that they intended to have, and the plaintiff agreed they should have, the whole premises in tenantable repair before they were bound to repair any part.

Nor will this raise any inconvenience different in kind from that which follows from holding the condition divisible. If it be divisible, still the whole of the part as to which the action is brought must be shown to have been put in repair: non-repair of a single room would show the condition not performed as to the house, if that part of the covenant were sued on. Inconvenience of this sort must attend every case of condition precedent. On the other hand, the intentions of parties may be defeated, and great injustice done, by allowing an action to be maintained for non-repair of some part, the previous condition of which might have cast little burden on the landlord to put in repair, while he has neglected to do more expensive repairs to another part, the complete repair of which may have been the tenant's principal motive for taking the premises at all.

We think it better to avoid all such questions, and that the verdict on the third issue should be entered for the defendants.

*Rule absolute.*¹

MILNER v. FIELD.

IN THE EXCHEQUER, NOVEMBER 25, 1850.

[*Reported in 5 Exchequer Reports, 829.*]

ASSUMPSIT for goods sold and delivered, work and labor, and materials, &c. Pleas: non-assumpsit, payment, and set-off. Issues thereon.

¹ Approved and followed in *Coward v. Gregory*, Law Rep. 2 C. P. 153. — Ed.

At the trial before Pollock, C. B., at the last Surrey Assizes, it appeared that the plaintiff sought to recover for work done under a written agreement, whereby the plaintiff agreed to build for the defendant thirty houses for the sum of 3,130*l.*, to be paid by instalments as the work progressed. There were penalties for the non-performance of the works at certain stipulated periods; and also a proviso, that none of the instalments should be payable unless the plaintiff should deliver to the defendant a certificate signed by the surveyor for the time being of the defendant, that the works had been in all respects well and substantially performed, according to the specifications and plans. Some of the instalments had been paid, and the action was brought to recover the balance. No certificate was obtained; but the plaintiff's counsel tendered evidence to show that the defendant had appointed his own father as his surveyor, and that although the works were in all respects properly done, the certificate was withheld fraudulently and by collusion with the defendant. It was objected on the part of the defendant that this evidence was inadmissible; and the learned judge, being of that opinion, nonsuited the plaintiff, reserving leave for the plaintiff to take the opinion of the Court upon the point, and if they should think the evidence admissible, the cause was to be referred.

Lush in the present Term (November 11) moved accordingly, and submitted, that the want of a certificate could not be taken advantage of under the general issue; but that the proviso should have been pleaded specially, or at all events the plaintiff ought to have been allowed to give evidence of fraud.

Cur. adv. vult.

POLLOCK, C. B., now said: In this case there will be no rule. Where, by the contract itself, the certificate of a surveyor is made a condition precedent to the right to payment, even if it be withheld by fraud, that is only the subject of a cross-action. The nonsuit therefore was right.

Rule refused.

STAUNTON AND ANOTHER v. WOOD AND OTHERS.

IN THE QUEEN'S BENCH, FEBRUARY 14 AND 15, 1851.

[Reported in 16 *Queen's Bench Reports*, 638.]

ASSUMPSIT. The count recited that plaintiffs agreed to sell to defendants "certain goods, to wit, fifty tons of good cable bars, at and for the price of 9*l.* per ton, the said goods to be delivered forthwith by the plaintiffs to the defendants at the works, and the said price to be paid by the defendants to the plaintiffs in cash in fourteen days from the time of the making of the said contract." Mutual promises. Averment: That fourteen days had elapsed, and that "plaintiffs have in all

things performed and fulfilled the contract on their part." Breach: Non-payment. Plea: That a reasonable time, according to the tenor of the contract, for the delivery of the goods, within which reasonable time the goods according to the tenor of the contract might and ought to have been delivered, elapsed before the expiration of fourteen days from the making of the contract; and that, although defendants were always ready and willing to accept the goods and pay for them, of which plaintiffs had notice, and were requested to deliver the goods, yet plaintiffs would not deliver the goods; without this, that plaintiffs have in all things performed and fulfilled the contract *modo et formâ*. Conclusion to the country.

General demurrer. Joinder.

The demurrer was argued in this Vacation.

Phipson, for the plaintiffs. The demurrer is to the plea; but the real question depends on the construction of the contract stated in the count, whether it makes it a condition precedent to the right to demand payment that the plaintiffs should be ready to deliver the goods. The agreement is to deliver "forthwith;" that cannot mean instantaneously. It means as soon as plaintiffs reasonably can deliver under the circumstances: *Tennant v. Bell*.¹ In truth the contract is no more than the law would have implied. The plaintiffs are to deliver the goods in an uncertain time, as short as they can reasonably make it, but which may be more or less according to circumstances. Then, as this uncertain time may be more than fourteen days, and the day of payment may come before that of delivery, the defendants must, according to the rule stated in note (4) to *Pordage v. Cole*,² be taken to have relied on the plaintiffs' promise, not upon the performance: *Mattock v. Kinglake*, *Wilks v. Smith*. The plea avers that this uncertain time has now been ascertained, and that it has turned out to be less than fourteen days; but the question, whether the delivery is a condition precedent or not, depends on what was known and intended at the time of the contract, not on what happens afterwards. The plea does not aver that a reasonable time for the delivery of the goods must in all cases be less than fourteen days, or that the parties supposed that it must, and made their contract accordingly. If it had so averred, the plea would be good in substance, though probably amounting to non-assumpsit, as denying the legal effect of the contract declared upon. The Court cannot know what a reasonable time for delivering bars at the plaintiffs' works may be. [WIGHTMAN, J. This is not a contract to manufacture the bars, but to sell them and deliver them forthwith. Is it a reasonable intendment that the parties thought that this could not be done within fourteen days?] The Court cannot judicially know what might be reasonably expected; it must depend on all the circumstances. *Simpson v. Henderson*.³ [ERLE, J. Has there ever been a decided case in which there have been mutual promises, and the time for the plaintiff's

¹ 9 Q. B. 684.

² 1 Wms. Saund. 320 b.

³ Moo. & M. 300.

performance of his part has actually come before the time for the defendant's performance of his, and the plaintiff has been wholly in default, and nevertheless has recovered?¹ I do not wish to be understood to give an opinion, but ask the question for information, as on your construction of the contract the plea raises that point.] Where performance is not a condition precedent by the contract, a breach in fact is no plea. *Dicker v. Jackson*.

Winston, contra. It appears by the plea that "forthwith" did, under the circumstances of this particular case, mean less than fourteen days. *Simpson v. Henderson* shows that the circumstances might be legitimately taken into account; and, if so, there is a defence; and though the form of the plea ought perhaps to have been non-assumpsit, it is good on general demurrer. *Kemble v. Mills*.² No case has been cited in which it appeared on the face of the record that a reasonable time for the performance by plaintiff of what was alleged to be a condition precedent was in fact less than that for the performance by the defendant.

Phipson, in reply. The plea does not say that a reasonable time was necessarily, or probably, to be less than fourteen days. It says that it turned out afterwards to be less. The case is precisely within the words of Mr. Serjeant Williams in note (4) to *Pordage v. Cole*:³ "If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money or other act is to be performed," &c.

Cur. adv. vult.

PATTESON, J., now delivered the judgment of the Court.

We have considered this case and the authorities referred to on the argument, and are of opinion that, according to the statement of the contract in the declaration itself, the delivering of the goods was a condition precedent. Every contract must be construed according to the intention of the parties, which in the present case the demurrer calls upon the Court to ascertain. We think it manifest that, by the use of the word "forthwith," as to the delivering of the goods, in connection with the payment in fourteen days, the parties intended that the goods should be delivered at some time within the fourteen days. Now the declaration alleges a general performance by the plaintiffs, and that is sufficient on general demurrer, and must be taken to mean a delivery or offer to deliver. It would be bad on special demurrer; but, being good on general demurrer, it becomes a material allegation, and is traversable. The plea has traversed it, and is good in that respect,

¹ See *New v. Swain, Danson & Lloyd's Mercantile Cases*, 193, and *Bunney v. Poyntz*, 4 B. & Ad. 568; in which cases it appears to have been held, at *nisi prius*, that, where the period of credit has expired before an actual delivery, a readiness to pay the price is a condition precedent to the right to demand a delivery of the goods, though the purchaser has not failed, and no right analogous to that of stoppage *in transitu* has arisen. There does not appear to be any case, except the principal one, in which the converse has been discussed.

² 1 M. & G. 757.

³ 1 Wms. Saund. 320 b.

without its being necessary for us to say how far the introductory matter of the plea could of itself have formed a sufficient answer to the declaration.

Judgment for defendants.

ELLEN v. TOPP.

IN THE EXCHEQUER, APRIL 15, 1851.

[*Reported in 6 Exchequer Reports, 424.*]

COVENANT on an indenture of apprenticeship of the 21st of July, 1846, by the master against the father of the apprentice, the father being a party to the indenture. The material parts of this indenture (of which profert was made) were as follows: "This indenture witnesseth, that Richard Topp, an infant, of the age of sixteen years or thereabouts, by and with the consent of his father, George Topp, of, &c., farmer, doth put himself apprentice to Frederick Ellen, of, &c., auctioneer, appraiser, and corn-factor, to learn his art, and with him after the manner of an apprentice to serve from the 1st day of July now last past unto the full end and term of five years from thence next following, to be fully complete and ended; during which term the said apprentice his master faithfully shall serve, his secrets keep, his lawful commands everywhere gladly do." The indenture then proceeded to state that the apprentice should do no damage to his master, &c., and that he "shall not absent himself from his master's service day or night unlawfully, but in all things, as a faithful apprentice, he shall behave himself towards his said master and all his during the said term. And the said Frederick Ellen, in consideration of the sum of 70*l.* to him in hand paid by the said George Topp upon the execution of these presents (the receipt whereof the said Frederick Ellen doth hereby acknowledge), doth hereby covenant and agree to and with the said George Topp, his executors and administrators, and also the said Richard Topp, that he, the said Frederick Ellen, his executors and administrators, his said apprentice in the art of an auctioneer, appraiser, and corn-factor, which he useth, by the best means that he can, shall teach, and instruct, or cause to be taught and instructed, finding unto the said apprentice sufficient meat, drink, and lodging, and other necessities during the said term, except wearing apparel, medical attendance, and pocket-money; and the said George Topp, for himself, his executors and administrators, doth hereby covenant and agree with the said Frederick Ellen, his executors and administrators, that he the said George Topp, his executors and administrators, shall and will find and provide his said son Richard Topp with wearing apparel, medical attendance, washing, and pocket-money, during the said term; and for the true performance of all and every the said covenants and agreements, either

of the said parties bindeth himself unto the other by these presents." The declaration then stated, that the said Richard Topp afterwards, to wit, on the said 21st of July, 1846, entered and was then received into the service of the plaintiff as such apprentice as aforesaid, and continued in such service under and by virtue of the said indenture for a long space of time, to wit, from the day and year last aforesaid until and upon the 22d of July, 1849; and laid as a breach that the said Richard Topp did not nor would faithfully serve the plaintiff according to the tenor and effect, true intent and meaning of the said indenture, but on the contrary thereof the said Richard Topp, during the said term of five years in the said indenture mentioned, to wit, on the said 22d of July, 1849, did unlawfully absent himself from the service of the plaintiff, and hath from thence hitherto remained and continued absent from the service of the plaintiff, contrary to the tenor and effect of the said indenture, and of the said covenant of the defendant in that behalf made as aforesaid, to the plaintiff's damage, &c.

The defendant, after setting out the indenture on oyer, pleaded that the plaintiff, at the time of the making of the said indenture as in the declaration mentioned, exercised the art and carried on the business of an auctioneer, appraiser, and corn-factor, as therein mentioned; and that the apprenticeship and covenants aforesaid were made with the plaintiff as such auctioneer, appraiser, and corn-factor, and not otherwise, and that, after the making of the said indenture, and before the accruing of the cause of action, &c., to wit, on, &c., the plaintiff voluntarily and of his own free will gave up, relinquished, abandoned, and ceased to exercise and carry on, and hath not, at any time since, exercised and carried on the art and business of a corn-factor as aforesaid. Verification.

Replication: That the plaintiff relinquished his business as a corn-factor aforesaid, with the full knowledge and consent of the defendant in that behalf; and that, from the time of such relinquishment continually until the accruing of the cause of action in the declaration mentioned, the said Richard Topp, with full knowledge of such relinquishment as aforesaid, continued, with the consent of the defendant in that behalf, to serve the plaintiff under the said indenture. Verification.

Special demurrer to the replication, *inter alia*, on the grounds that the consent of the defendant to the relinquishment by the plaintiff of his business of a corn-factor aforesaid, and to the continuing of the said Richard Topp to serve the plaintiff as in the replication mentioned, is not alleged to have been given or contained by or in any deed or instrument under the seal of him the defendant, and that the contract in the declaration mentioned could not in law be varied or altered by parol, or by any consent other than a consent given or contained in some deed or instrument under seal; and that the replication is a departure from the declaration; that the contract relied upon in the

declaration is a contract to employ and serve in the art and mystery of an auctioneer, appraiser, and corn-factor; and the replication sets up some new alleged contract to employ and serve in the art and mystery of an auctioneer and appraiser only.

Joinder in demurrer.

The demurrer was argued in Easter Term last (April 26, 1850), before POLLOCK, C. B., PARKE, B., ROLFE, B., and PLATT, B., by *Macnamara* for the defendant, in support of the demurrer, and by *Taprell* for the plaintiff; and the Court took time to consider their judgment; but afterwards POLLOCK, C. B., said that, as a difference of opinion existed among certain members of the Court, they wished to hear the case re-argued. The case was accordingly re-argued in Hilary Term last (Jan. 20), before POLLOCK, C. B., PARKE, B., ALDERSON, B., and PLATT, B., by

Macnamara for the defendant in support of the demurrer. The replication is clearly bad as amounting to a departure from the declaration, and as setting up a parol discharge from an obligation under seal. The plaintiff, however, will contend that the plea does not contain any defence to the action, and the question which the Court will ultimately have to decide may be thus stated: A master who exercises three trades takes an apprentice, and covenants to instruct him in such trades, but during the term of apprenticeship abandons one of the trades; the apprentice thereupon leaves his service; can the master maintain an action upon the indenture of apprenticeship for the apprentice thus leaving him?

¹ . . . The exercise of the trades, or rather the non-abandonment of any one of them by the master, is a condition precedent to the service of the apprentice; or, in other words, they are dependent covenants. The non-exercise of the trades for a few days merely would not justify the apprentice in leaving; but the relinquishment of any of them would. The doctrine of dependent covenants is fully discussed in the notes to *Pordage v. Cole*, 1 Wms. Saund. 320 b, and *Cutter v. Powell*, 2 Smith's Leading Cases, 9; where the most important cases bearing upon the subject are cited. The principle was laid down by Lord Mansfield in *Boone v. Eyre*, which has been often recognized and acted upon. "The distinction is very clear," said that learned judge; "where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent." The question seems to be, whether, notwithstanding the breach, the contract can be substantially carried out, and whether adequate compensation can be obtained for such breach. The reason of the rule is, that the damages would be unequal if a breach of a comparatively unimportant part of the contract afforded a

¹ A part of the case is omitted as not relating materially to the subject of "Conditions." — Ed.

ground for rescinding it altogether. The chief tests to be applied appear to be the materiality and importance of the covenants broken, and the difficulty of assessing damages thereupon. There is a close analogy between these questions and those which relate to penalties and liquidated damages. In the latter instance, the importance of the matter, the performance of which is secured by a penalty, and the difficulty of estimating the damages for its breach, are the main points to be considered. *Galsworthy v. Strutt*.¹ The rule adopted for the construction of covenants as dependent or independent is this: That the good sense of the case, the nature of the instrument, and the intention of the parties are to decide the question. Applying these principles to the present case, the covenant by the apprentice to serve is dependent upon the implied covenant of the master not to relinquish any of his trades. The trades carried on by a master at the time when an apprentice is bound to him form the basis of the whole contract. It is of course a preliminary inquiry with the father or other guardian of the apprentice, what trades are exercised by this person to whom the apprentice is to be bound; are they such as I desire him to learn? This question affects the very position and status of one of the contracting parties, whose trading capacity forms the whole inducement for the contract. If one trade may be given up, why may not all? Where is the line to be drawn? Suppose two out of the three had been abandoned, was the apprentice to continue in the service to learn the third trade alone? The one abandoned may have been the most material of the three; it may have been the only one which the father desired his son to learn; but yet it may have been necessary to bind him to a master who exercised the three, as it frequently happens in country towns that several trades must be followed by one person in order to gain a livelihood. Perhaps it was necessary for the son to learn and to exercise the three for himself in order to gain a livelihood. The master at one time thought proper to combine the three, why should not the apprentice have an opportunity of doing so? This plea must be considered as if it came before the Court on general demurrer; and, in order to support it, the Court will presume, if necessary, that the trade abandoned was the most important one. The consequences of compelling an apprentice to stay with a master who can teach him that only which is immaterial or insufficient for a livelihood, would be very serious. An apprentice may be bound for seven years, and the day after his binding the master may relinquish the most important trade. Can it be said that, in such a case, the apprentice must remain until the end of the term? If it should be contended that there may be a cross-action on the part of the apprentice, the answer is, that such a breach as this cannot be adequately paid for in damages. The injury done to a young man by forcing him to waste the best years of his life does not admit of compensation. The only efficient

¹ 1 Exch. 659.

remedy is afforded by allowing him to seek another service. The exercise of the trades is an entire consideration for the service, and is correlative with it. The covenants on the part of the master, after a breach like this, cannot be substantially performed, as it is a very different thing to exercise two trades instead of three. If the nature of the instrument be looked at, we shall find that its very object is the instruction and protection of the apprentice; this is its substance and its primary intent. The premium is paid in the first instance, and a long term of service is fixed. In some towns, to have served an apprenticeship to certain trades is a qualification required for the exercise of them; and it was necessary in order to obtain the freedom of the City of London. It was clearly the intention of the parties, that the apprentice was to learn and to be capable of following the same trades which his master followed at the time of the execution of the indenture.

The authorities are in favor of these views. The cases in which covenants have been held to be independent are distinguishable from this case. In *Boone v. Eyre* they were held to be so, because, as Lord Mansfield, C. J., said, "If the plea were allowed, any one negro, not being the property of the plaintiff, would bar the action;" showing that the importance of the covenant and of the breach were material points to be considered. *Campbell v. Jones* may be upheld upon the ground that a time was fixed for the payment of the money, but not for the teaching. (See remarks in *Glazebrook v. Woodrow*.) It seems the decision would have been different if the covenant had been to pay as soon as he should be taught. Again, the covenant broken by the plaintiff was not the most material part of the contract, as the defendant still had a right to use the patent, the specification whereof would give him full instruction regarding it. In *Winstone v. Linn* it was held, that the absence of the apprentice, who offered to return, and his disobedience of his master's orders, did not afford an answer to an action for not teaching him. The grounds of the decision were, that otherwise the apprentice would lose the benefit of the contract, for which a premium had been paid, if he were guilty of a single act of misconduct, or were absent for two days; and that the statute relating to misconduct of parish apprentices showed that, at common law, the master had no power in such case to refuse to teach. The Court, however, thought that there would have been a defence if the apprentice had absented himself during the whole of the term, or if an unreasonable time had elapsed before he offered to return.

The cases in which covenants have been holden to be dependent are clear authorities in favor of the defendant. *Duke of St. Albans v. Shore*,¹ (and the judgment at page 280), *Glazebrook v. Woodrow*, *Kingston v. Preston*, *Thomas v. Cadwallader*, *Large v. Cheshire*, *Oliver v. Fielden*.

Taprell, contra. . . . Supposing the plaintiff to have broken his

¹ 1 H. Bla. 271.

covenant in respect to that portion of the agreement by which he contracted to instruct the apprentice in the art and business of a corn-factor, yet, inasmuch as the covenant is independent, the defendant's true remedy is by a cross-action against the plaintiff for damages, and the plea, therefore, affords no answer to this action. 1 Wms. Saund. 320 c, Davidson v. Gwynne, Stavers v. Curling, Franklin v. Miller, Cutler v. Bowen.¹ In Winstone v. Linn, Bayley, J., in speaking of indentures of apprenticeship, says: "Such indentures generally contain reciprocal covenants by each party. Those covenants are not dependent, but are mutual and independent, entitling each party to his remedy for a breach of them. The master, therefore, is liable to an action for the breach of the covenant to instruct and maintain the apprentice during the term agreed upon." Here the master covenants to teach the apprentice three distinct trades. His neglect to teach one of them only goes to a part of the consideration. These trades are treated as distinct by several Acts of Parliament; the Court is bound to take judicial notice that such is the fact. In the cases relied upon by the defendant, the consideration was indivisible, and the performance on the part of the plaintiff of the covenant on his part formed a condition precedent to his right of recovery. If the trade of a corn-factor formed the substantial part of the consideration, the plea ought to have contained an averment to that effect. If the plea is bad in part, it is bad altogether. 1 Wms. Saund. 28. The apprentice may obtain his discharge under the Stat. 5 Eliz. c. 4, § 35, if he has been injured by the master's abandonment of one of the branches of his business; but it may be that the apprentice has received benefit rather than any injury from the relinquishment of this business. He also cited Morrison v. Chadwick² in support of this part of his argument. . . .

Macnamara, in reply. . . .

The plea need not contain the averment that the trade of corn-factor is essential to the plaintiff's business; for the deed on which the declaration is framed treats the three trades as one art. The suggested remedy by cross-action presents many difficulties. There would not be any true rule by which to calculate the damages. At what time is the action to be brought? If it were to be delayed until after the expiration of the apprenticeship, the apprentice might sustain a loss for which he might not be able to receive adequate compensation. If the action is to be brought during the term, such a proceeding would militate against the relationship of parent and child, which has been suggested to exist between the parties. The remedy given by the 5 Eliz. is in favor of the apprentice, and is altogether cumulative. *Cur. adv. vult.*

The judgment of the Court was now delivered by

POLLOCK, C. B. This was an action on an indenture of apprenticeship by the master against the father of the apprentice, the father having been party to the indenture. The breach assigned is, that the

¹ 11 Q. B. 973.

² 7 C. B. 266.

apprentice did not nor would faithfully serve the plaintiff according to the tenor and effect of the indenture; but on the contrary did on the 22d of July, 1849, unlawfully absent himself from the service of the plaintiff, and has thenceforth continued absent from such service. [The Lord Chief Baron, after stating the pleadings, proceeded:] On the part of the plaintiff it was scarcely contended that the replication could be supported. It is obviously bad. Such parol consent cannot entitle the plaintiff to maintain an action of covenant in this form, which is founded entirely on the deed under seal. The case therefore resolves itself into the only question really argued before us, which was whether the plea was good. . . . The objection taken by Mr. Taprell was, that the carrying on all the three trades was not a condition precedent to the plaintiff's right to recover, but that his omission or refusal to carry on any one must be the subject of a cross-action.

This objection is founded on one of the rules for determining when covenants are dependent on each other; which is laid down in *Boone v. Eyre*, and followed in *Campbell v. Jones* and other cases collected in the note to 1 Wms. Saund. 320 c. That rule is, that when a covenant goes to part of the consideration on both sides, that is, forms a part of the consideration on the plaintiff's side for the defendant's covenant on the other, and a breach of such covenant may be paid for in damages, and the whole of the remaining consideration has been had by the defendant, the covenant is independent, and the performance of it is not a condition precedent.

"The reason of the decision in these cases is," as is observed by the learned editor, "that where a person has received a part of the consideration for which he entered into the agreement, it would be unjust that, because he had not had the whole, he should, therefore, be permitted to enjoy that part without either paying or doing any thing for it. Therefore the law obliges him to perform the agreement on his part, and leaves him to his remedy to recover any damages he may have sustained in not having received the whole consideration."

It is remarkable that, according to this rule, the construction of the instrument may be varied by matter *ex post facto*; and that which is a condition precedent when the deed is executed may cease to be so by the subsequent conduct of the covenantee in accepting less: as in the cases referred to, the defendant, in the first, might have objected to the transfer, if the plaintiff had no good title to the negroes, and refused to pay; in the second, he might have objected to the payment if the plaintiff had refused to transfer the patent, though he had been willing to teach the art of bleaching. But this is no objection to the soundness of the rule, which has been much acted upon. But there is often a difficulty in its application to particular cases, and it cannot be intended to apply to every case in which a covenant by the plaintiff forms only a part of the consideration, and the residue of the consideration has been had by the defendant. That residue must be the substantial part of the contract; and if, in the case of *Boone v. Eyre*, two or three negroes

had been accepted, and the equity of redemption not conveyed, we do not apprehend that the plaintiff could have recovered the whole stipulated price, and left the defendant to recover damages for the non-conveyance of it.

Whether the rule can be applied to the present case has been a matter of great doubt in the minds of some of us; but, after much consideration, we agree that it is not applicable. If this had been an action on a covenant to pay an apprentice fee at the end of the term, and the apprentice had served the whole period, and had had the benefit of instruction as such in two of the trades, it would, we are disposed to think, have been no answer to the action that the plaintiff had discontinued one. But this is an action for not continuing to serve as an apprentice; and although the later services of an apprentice are much more valuable than the early, and are in part a compensation to the master for his instruction in the commencement of the apprenticeship, and so are analogous in some degree to an apprentice fee payable *in futuro*, yet the immediate cause of action is the breach of the contract to serve, and the obligation to serve depends upon the corresponding obligation to teach as an apprentice; and, if the master is not ready to teach in the very trade which he has stipulated to teach, the apprentice is not bound to serve. To this particular covenant to serve, the relative duty to teach seems to us to be directly a condition precedent; and we are not able to distinguish between the three trades of auctioneer, appraiser, and corn-factor, so as to say that one is more the substantial part of the contract than another.

As the plaintiff by his own fault has disabled himself from acting as a master in all the three trades, he has no right to complain of the defendant's son refusing to continue to serve in any.

Our judgment will, therefore, be for the defendant.

Judgment for the defendant.

GRAFTON AND OTHERS v. THE EASTERN COUNTIES RAILWAY COMPANY.

IN THE EXCHEQUER, MAY 4, 1853.

[*Reported in 8 Exchequer Reports, 699.*]

THE declaration stated that by certain articles of agreement, bearing date the 30th of October, 1851, the plaintiffs and defendants covenanted and agreed with each other, amongst other things, in manner following, that is to say: that the plaintiffs would, during a certain term of years therein mentioned, supply to the defendants, and that the defendants would take from the said plaintiffs, all the coke the said company, during the continuance of the said agreement, should require at Lowestoft,

equal to the reasonable capacity of certain ovens therein mentioned to manufacture, for a certain district therein mentioned, at the price of 18s. 6d. per ton, laden into the said company's trucks, provided that the said coke should be of the best quality; the said plaintiffs on their part engaging that the same should be large and of the best quality, and equal to that made from the best Brancepeth coal, and to be to the satisfaction of the said railway company's inspecting officer for the time being; and agreeing that the said railway company should have power to refuse to accept coke of an inferior quality or small in its pieces, and to purchase what they might require elsewhere, if the plaintiffs did not supply coke of the best quality and equal to that above described, and to the satisfaction of the said railway company's said officer, and to charge the plaintiffs with the excess of price beyond the said contract price. And the plaintiffs say, that during the said term and continuance of the said agreement, they manufactured and supplied to the defendants, in the manner provided by the agreement, certain coke which they required at Lowestoft for the said district, which was of the quality required by the agreement, and equal to that made from the said Brancepeth coal, and large in its pieces, and of which the value amounted to the sum of 1,100*l.*, but that the defendants then refused to take the same and pay for the same after the rate aforesaid, contrary to the said articles of agreement. And for that, during the said term and the continuance of the said agreement, the plaintiffs manufactured and supplied to the defendants certain other coke, which they required at Lowestoft for the said district, according to the said agreement; and which was such coke as the plaintiffs engaged to supply according to the said agreement as aforesaid, and of which the value amounted at the rate aforesaid to the sum of 198*l.* 3s. 5d., and in all things performed the said agreement on their parts; and although the defendants then accepted and received the said coke they have thence hitherto refused to pay for the same as aforesaid.

The defendants pleaded to the [first] breach above assigned, secondly, that the plaintiffs did not during the said term manufacture and supply to the defendants, in the manner provided by the said agreement, any coke which they required at Lowestoft for the said district, which was of the quality required by the agreement and equal to that made from the best Brancepeth coal, and large in its pieces, as in and by that breach above alleged.

The defendants pleaded, thirdly, to the same breach, that no part of such coke was to the satisfaction of the defendant's inspecting officer for the time being; wherefore they refused to accept and pay for the said coke, or any part thereof, as in that breach alleged.

The plaintiffs replied to these pleas, that the coke, upon the refusal to take and pay for which the first breach is above assigned, was, during the said term, manufactured and supplied to the defendants in the manner provided by the said agreement, and was required at Lowestoft for the said district, and was of the quality required by the said agree-

ment, and equal to that made from the best Brancepeth coal, and large in its pieces.

Demurrer and joinder.

H. T. Holland, in support of the demurrer. The pleadings do not show any cause of action; for, according to the terms of the agreement between these parties, the coke supplied by the plaintiffs ought to have been "to the satisfaction of the company's inspecting officer." This is a material part of the contract, and is a condition precedent to the plaintiff's right to recover for coke supplied. In *Milner v. Field* a building agreement contained a proviso that no instalment should be paid unless the plaintiff delivered to the defendant a certificate signed by the surveyor of the latter that the works were performed according to the specifications; and it was there held, that the certificate was a condition precedent to the right to payment, and that the want of it was a good answer to the action. He was then stopped by the Court.

Maynard, contra. According to the true construction of this agreement, either the obtaining of the satisfaction of the defendants' officer is not a condition precedent, or if it be so that condition is void. First, the meaning of this clause of the agreement is, that if the coke should not be large and of the best quality, the company should have the power to reject it. This is the subject to which the terms "to the satisfaction of the defendants' officer," is applicable. The inspecting officer was inserted as a person well qualified to form a proper opinion as to the quality of the coke supplied. It does not appear by the pleadings that he was dissatisfied, or that, if he was, his dissatisfaction was notified to the plaintiffs; and it does appear that the coke was of the quality stipulated for by the agreement. [PARKE, B. This stipulation empowers the company's officer to reject any coke whatever with which he may be dissatisfied. It is to be presumed that he will not be satisfied with the coke which may not be of the quality specified. The satisfaction of the officer is a condition precedent to the plaintiffs' right to insist upon the company's acceptance of the coke, and therefore the plaintiffs ought to have inserted an averment to that effect in their declaration.] Secondly. The condition is void and is not binding upon the plaintiffs. Here the party, upon whose decision the rights of the plaintiffs are made to depend, is the servant of the defendants, and consequently they have it in their own power to withhold payment from the plaintiffs. If the party named had been mutually agreed upon as the arbitrator between the parties, the case would have been different. The present case, however, falls within the principle of the decision in *Dallman v. King*,¹ where, under an agreement that the lessee should spend a certain sum in repairs, to be inspected and approved of by the lessor, and to be done in a substantial manner, the lessee was to be allowed to retain that amount out of the first year's rent of the premises; it was held that the lessor's approval was not a condition prece-

¹ 4 Bing. N. C. 105.

dent to the lessee's retaining the rent. And the Court there said that the case was distinguishable from that of *Morgan v. Birnie*, where the defendant was to pay for a building upon receiving an architect's certificate that the work was done to his satisfaction; and the architect having checked the builder's charges and sent them to the defendant, it was held that that did not amount to such a certificate of satisfaction as to enable the builder to recover, although the defendant had not objected to pay on the ground that no sufficient certificate had been rendered. In the latter case the architect was appointed by the parties the sole arbitrator in settling the amount to be expended on the premises and all disputes. And in *Harrison v. The Great Northern Railway Company*,¹ which is a similar case to the present, Williams, J., says: "There is a difference between the case in which the person who is to certify is made an arbitrator, and the case where he is a servant to do some act which the company might order him to do." Upon the defendants' construction of this contract, they have themselves an absolute power of discretion in the matter. [MARTIN, B. Parties therefore ought to be careful how they enter into contracts containing stipulations giving such powers.]

PER CURIAM. The clause in question is a condition precedent to the plaintiffs' right of action and is binding upon them. They may amend, otherwise there will be

Judgment for the defendants.

MASON v. HARVEY.

IN THE EXCHEQUER, JUNE 6, 1853.

[Reported in 8 *Exchequer Reports*, 819.]

ASSUMPSIT on a policy of insurance effected by the plaintiff, a pawnbroker, with the Norwich Union Fire Insurance Society. The declaration stated the insurance to be (*inter alia*) 150*l.* on the shop of the plaintiff, and 1,000*l.* on pledges received under the 39 & 40 Geo. III., c. 99; also that there was indorsed on the policy the following (among other) conditions:² "Eighth: Whenever any fire shall happen, the party insured shall give immediate notice thereof to one of the secretaries or agents of the society, and within three calendar months deliver to such secretary or agent, under his or her hand, accounts exhibiting the full particulars and amount of the loss sustained, estimated with reference to the state in which the property destroyed or damaged was immediately before the fire happened; and such accounts shall, if required by the directors, be supported by the oral testimony, and by

¹ 21 L. J., C. P., 89.

² Some of the conditions expressly declared that, in case of non-compliance with their requisitions, "the policy will become void."

the depositions or affirmations in writing of the claimant, and of his or her servants, and by the production of his or her books and vouchers." The declaration alleged that, whilst the property continued so insured, the "said shop and divers pledges received under the 39 & 40 Geo. III., c. 99, and then being in the said shop, were damaged and destroyed by fire, &c. Breach: that the loss which so happened has not been made good to the plaintiff.

Plea: that the plaintiff did not, within the period of three calendar months after the said shop and pledges were so damaged and destroyed by fire, deliver to any secretary or agent of the said society, under his hand, any such accounts as are in and by the eighth condition mentioned and required, exhibiting the full particulars and amount of the loss sustained by the plaintiff as alleged, estimated with reference to the state in which the property damaged and destroyed was immediately before the fire happened by which the property was so damaged and destroyed.

Demurrer and joinder.

Unthank, in support of the demurrer. The plea is bad in substance. A compliance with the requisitions of the condition in question is not a condition precedent to the plaintiff's right to sue on the policy, but only renders him liable to an action for his breach of duty. The case falls within the principle of the decisions, that, where a person takes an estate or benefit under a contract, subject to a duty, the law will imply an undertaking to perform it; for the breach of which an action may be maintained. *Burnett v. Lynch*.¹ The language and sense of the condition are alike opposed to its construction as a condition precedent; and, moreover, it would be unjust so to construe it. Suppose the plaintiff delivered particulars of his loss, but some few of the pledges were omitted, is he on that account to be deprived of the whole benefit of the policy? [POLLOCK, C. B. The term "full particulars" must mean the best particulars the assured can reasonably give; otherwise it might happen that, if by some inadvertence a duplicate was omitted, or mentioned as lost when in fact it was not, the assured could not recover at all.] The only case on the subject is that of *Worsley v. Wood*, where one of the conditions of the policy was, that persons insured should procure a certificate of the minister, churchwardens, and some reputable housekeepers of the parish, importing that they were acquainted with the character of the assured, and believed that he had really sustained the loss without fraud; and it was held that the procuring such certificate was a condition precedent to the right of the assured to recover; and that it was immaterial that the ministers and churchwardens wrongfully refused to sign the certificate. In that case, however, the same injustice would not arise from construing the stipulation as a condition precedent, since it might be complied with at any time. [PLATT, B., referred to *Oldman v. Bewicke*.²]

¹ 5 B. & C. 589.

² 1 H. Bla. 577, note.

Crowder (*Brewer* with him), *contra*. The delivery of particulars of the loss is a condition precedent to the right of the assured to recover. *Worsley v. Wood* in effect decides this case. The assured is bound to give the best particulars which he can under the circumstances. He was then stopped by the Court.

POLLOCK, C. B. By the contract of the parties, the delivery of the particulars of loss is made a condition precedent to the right of the assured to recover. It has been argued that such a construction would be most unjust, since the plaintiff might be prevented from recovering at all by the accidental omission of some article. But the condition is not to be construed with such strictness. Its meaning is that the assured will, within a convenient time after the loss, produce to the company something which will enable them to form a judgment as to whether or no he has sustained a loss. Such a condition is in substance most reasonable; otherwise a party might lie by for four or five years after the loss, and then send in a claim when the company perhaps had no means of investigating it. The plaintiff may have liberty to amend by withdrawing the demurrer; otherwise judgment for the defendant.

ALDERSON, B., PLATT, B., and MARTIN, B., concurred.

Amendment accordingly

GRAVES v. LEGG AND ANOTHER.

IN THE EXCHEQUER, MAY 9, 1854.

[*Reported in 9 Exchequer Reports, 709.*]

THE declaration stated, that it was on the 19th of May, 1853, through Messrs. H. & R., brokers at Liverpool, agreed between the plaintiff and defendants in manner following, that is to say: the plaintiff then agreed to sell to the defendants, and the defendants to buy of the plaintiff, about 300 to 350 bales white washed Donskoy fleece wool, to arrive, at 10½*d.* per pound, laid down either at Liverpool, Hull, or London, deliverable at Odessa during August then next, old style, to be shipped with all despatch, warranted fair average quality, but, should they prove otherwise, to be taken with a fair allowance, which it was mutually agreed between buyer and seller should be assessed by the said Messrs. H. & R.; subject to the safe arrival of the wool in good condition at any of the ports stated, and the names of the vessels to be declared as soon as the wools were shipped; customary allowances, payment, cash in fourteen days, less 1½ per cent discount, from the date of finishing loading. Which agreement being made, afterwards the said wool, being 333 bales of wool of the quality and description in the said agreement mentioned, was, during the said month of August, old style, delivered, to wit, by the growers thereof at Odessa, to wit, to the

agents of the plaintiff in that behalf, and was with all despatch then shipped there on board a certain vessel called the *Science*, which said vessel then sailed from Odessa with the said wool on board thereof, and afterwards, to wit, on the 22d of November, 1853, arrived at Liverpool with the said wool on board safe and in good condition, and according to the terms of the said contract; and the plaintiff says, that the defendants have had notice of all the said premises, and that a reasonable time for the defendants to accept the said wools after the same arrived, and to fulfil their part of the contract, and pay for the said wools, has long since elapsed, and that he the plaintiff has at all times performed and fulfilled, and been ready and willing to perform and fulfil, all conditions precedent to his right to have the said wools accepted and paid for, and to his right to maintain this action. Yet the defendant would not at any time accept nor pay for the said wools, or any part thereof.

Plea: that the defendants agreed with the plaintiff to buy the said wool in the declaration mentioned, for the purpose of reselling the same in the way of their, the defendants', trade and business of wool-dealers, and thereby acquiring gains and profits. And further, that wool is an article that fluctuates greatly in price in the market; and that the defendants could only resell the said wool as aforesaid when, and not before, the defendants had notice of the same being shipped, and when and not before the name of the vessel in which it was so shipped had been declared, according to the said contract in the declaration mentioned; of all which premises the plaintiff, at the time of the making of the said agreement, had notice; and further that, although the plaintiff had such notice, yet the plaintiff did not declare to the defendants, or either of them, the name of the vessel in which the said wool was shipped, or within the time at or within which he was by the agreement bound to declare the same, that is to say, as soon as such wool was so shipped, but omitted so to do and delayed and omitted so to declare the name of the said vessel in which the said wool was so shipped as in the said declaration mentioned, or to give the defendants any notice of the same being so shipped, for a long and unreasonable time after the same was so shipped; and the defendants had not notice of the shipment of the said wool, or of the name of the vessel in which the same had been shipped, until after the expiration of a long and unreasonable time after the same had been so shipped, and after the plaintiff was bound and ought to have given and declared the same, and might and could have done so; and further, that between the time when the name of the said vessel ought to have been declared according to the said agreement in the said declaration mentioned, and the time when it was first declared to the defendants, or when they first had any notice of the said ship having sailed with the said wool on board thereof, the price of wool in the market had greatly fallen, and the said wool thence continually remained so fallen in price, and the same, when the name of the said vessel was first declared, and when the defendants

first had notice or knowledge of the same having been so shipped, would sell or could be sold only for a much less sum of money than it would have done at the time when the plaintiff ought to and could have declared the name of the said vessel, or given the defendants such notice as aforesaid. Wherefore the defendants did not nor would accept or pay for the said wool, as in the said declaration mentioned.

Demurrer and joinder.

The case was argued in the present Term (May 3), by

Blackburn, in support of the demurrer. The question is, whether, upon the true construction of the contract set forth in the declaration, the neglect on the part of the plaintiff to declare the names of the vessels in which the wools were shipped is a defence to this action; in other words, whether such matter is a condition precedent to the plaintiff's right of recovery. It is submitted that it is not. The principles upon which the decision of the question must turn can scarcely be disputed. Those principles are to be found in the notes to *Pordage v. Cole*, 1 Wms. Saund. p. 320 a, note (4); and also in the notes to the case of *Cutter v. Powell*, 2 Smith's Leading Cases, p. 1. If the matter goes to the very root of the contract, and is the pith and essence of it, such matter must be held to be a condition precedent; but if the non-observance by the plaintiff of that particular element of the contract may be compensated in damages, it is not a condition precedent. The fact stated in the plea, that the price of wool had fallen in the market, supports the plaintiff's construction of the contract, by showing that the neglect by him to declare the names of the vessels, by which omission the defendants have sustained an injury, is capable of being compensated in damages. [PARKE, B. Could the plaintiff contend that shipping the wools with all despatch is not a condition precedent?] That may be admitted to be so; but the language of the contract in speaking of the matter in question undergoes a change, the words being "the names of the vessels to be declared as soon as the wools were shipped." The shipping and delivery of the cargo is the substance and essence of the contract; and, by the nature of the transaction, the names could not be declared at once, as the advice would take time to arrive in this country. The time of the shipping of the wools may, therefore, be taken as a condition precedent; and the cases of *Glaholm v. Hays* and *Ollive v. Booker* seem to support that position; but the matter relied upon by the defendants cannot be so treated. [PARKE, B., referred to *Ellen v. Topp*, as laying down the rule upon the question of conditions precedent.]

C. E. Pollock, contra. The question turns upon the construction of this particular contract. The plea merely brings before the Court the materiality of this element of it, by showing that the parties to the contract understood the matter to be a condition precedent, by stating the reason why the names of the vessels in which the wools should be shipped were required to be declared. In putting an interpretation upon this contract, the Court will no doubt act upon the principle expounded

by Lord Kenyon, C. J., in *Porter v. Shephard*,¹ by holding "that conditions are to be construed to be either precedent or subsequent, according to the fair intention of the parties to be collected from the instrument; and that technical words, if there be any to encounter such intention, should give way to that intention." If the shipping of the wools with all despatch, and their safe arrival, be conditions precedent, which they clearly are, the stipulation that the names of the vessels are to be declared is one also, inasmuch as that stipulation forms part of the same sentence. The word "subject" overrides the whole clause. The plaintiff cannot rely upon the performance of any portion of his part of the contract to the benefit of the defendants, as was the case of *Boone v. Eyre*,² the reason being, as stated in 1 Wms. Saund. 320 e, that, "where a person has received a part of the consideration for which he entered into the agreement, it would be unjust that, because he has not had the whole, he should therefore be permitted to enjoy that part without either paying or doing any thing for it. Therefore the law obliges him to perform the agreement on his part, and leaves him to his remedy to recover any damage he may have sustained in not having received the whole consideration." If any portion of the wools had, on their arrival at the port of destination, been accepted by the defendants, the case would have fallen under the above-mentioned principle. But that was not done. On the other hand, where certain acts are to be performed on either side, and the contract remains open, and the defendant has received no benefit under it, the plaintiff must show that he has performed all these acts on his part which he was bound to perform, in order to sustain the action. The plaintiff may have incurred a disadvantage in having shipped the wools at Odessa, but the defendants have received no benefit therefrom. The defendants, therefore, are in a position to insist upon the non-performance of this condition precedent as an answer to this action.

Blackburn, in reply. It is admitted that there has been no waiver on the part of the defendants. In putting a construction upon the contract, the intention of the parties at the time of making it ought alone to be considered; and, consequently, what takes place *ex post facto* ought to be rejected, except for the purpose of showing that the occurrence of what has happened might have been in the contemplation of the parties at the time of making the contract. The fact that the wools might be shipped in several vessels would go to show that this matter was not a condition precedent. If such was the intention of the parties, mere words ought not to overrule it. *Fishmongers' Company v. Robertson*,³ per Tindal, C. J. *Kemble v. Farren*⁴ may be cited as one of those cases in which the courts, in putting a construction upon a written agreement, have held that mere words cannot overrule the intention of the parties.

Cur. adv. vult.

¹ 6 T. R. 668.

² 5 M. & Gr. 197.

³ 2 Bla. 1313.

⁴ 6 Bing. 141.

The judgment of the Court was now delivered by

PARKE, B. The pleadings in this case are these (his lordship stated them, and proceeded): The question raised by these pleadings is whether the provision, that the names of the vessels should be declared as soon as the wools were shipped, was a condition precedent to the defendants' obligation to accept and pay for the wools according to the contract stated in the declaration, and under the circumstances stated in the plea.

This contract, we think, is to be construed with reference to some of those circumstances. It is stated in the plea, that the wool was bought, with the knowledge of both parties, for the purpose of reselling it in the course of the defendants' business; that it is an article of fluctuating value, and not salable until the names of the vessels in which it was shipped should have been declared according to the contract.

The declaration having averred, according to the 57th section of the Common Law Procedure Act, the performance of conditions precedent generally, the defendant proceeds in this plea to specify this condition of declaring the names of the vessels, as one on the breach of which he insists. The loss which he avers to have sustained by that breach is immaterial. The only question is, whether the performance of the agreement was a condition precedent or not to the defendants' contract to accept and pay for the goods.

In the numerous cases on the subject, in which it has been laid down that the general rule is to construe covenants and agreements to be dependent or independent according to the intent and meaning of the parties to be collected from the instrument, and of course to the circumstances legally admissible in evidence with reference to which it is to be construed, one particular rule well acknowledged is, that where a covenant or agreement goes to part of the consideration on both sides, and may be compensated in damages, it is an independent covenant or contract, and an action might be brought for the breach of it without averring performance in the declaration, under the old system of pleading; and under the new, the denial of such performance would be bad; and the cases of *Campbell v. Jones* and *Boone v. Eyre*¹ are instances of the application of the rule. But then it appears, as Mr. Serjt. Williams observes in 1 Saund. 320 d (and the Lord Chief Baron, in delivering the judgment of this Court in *Ellen v. Topp*, adopts the observation), the reason of the decision in that and similar cases, besides the inequality of damages, seems to be, that where a person has received part of the consideration for which he entered into the agreement, it would be unjust that, because he had not the whole, he should therefore be permitted to enjoy that part without either payment or doing any thing for it. Therefore the law obliges him to perform the agreement on his part, leaving him to his remedy to recover any damage he may have sustained in not having received the whole consideration.

¹ 2 Black. Rep. 1312, 1315.

Mr. Serjt. Williams goes on to observe that it must appear upon the record that the consideration was executed in part. This may appear by the instrument declared on itself, whereby a valuable right, part of the consideration, is conveyed, as in *Campbell v. Jones* or *Boone v. Eyre*, or by averment in pleading. When that appears, it is no longer competent for the defendant to insist upon the non-performance of that which was originally a condition precedent; and this is more correctly expressed, than to say it was not a condition precedent at all.

In this case, if the stipulation that the names of the vessels should be stated as soon as the wools were shipped was originally a condition precedent, it is so still. No other benefit was taken under the contract itself, as the consideration for the promise to pay the money, than the shipment and delivery of the goods by the named vessels; nor was any subsequently received by the acceptance of the goods or any part thereof. After such acceptance, the defendants would have been bound to pay the price, or the residue of it, and could not have insisted on the neglect to name in due time, but, if there had been any such neglect, would nevertheless have had their remedy for the damage by cross-action on the contract to declare the names. In the state of things on this record, the simple question is, whether this contract was originally a condition precedent or not. Looking at the nature of the contract, and the great importance of it to the object with which the contract was entered into with the knowledge of both parties, we think it was a condition precedent, quite as much indeed as the shipping of the goods at Odessa, with all despatch, after the end of August. And with respect to the shipment itself, Mr. Blackburn did not venture to contend that the performance of the plaintiff's contract in that respect was not a condition precedent.

The defendants, therefore, have a right to object to fulfil the contract on their part, as the plaintiff did not fulfil his, though they could no longer object to the plaintiff's non-performance had they afterwards taken any benefit under the contract.

Judgment for the defendants.

THOMPSON AND OTHERS v. GILLESPY.

IN THE QUEEN'S BENCH, JUNE 1, 1855.

[Reported in 5 *Ellis & Blackburn*, 209.]

THE first count of the declaration alleged that a charter-party was made and entered into by and between plaintiffs and defendant, of which the following is a copy: LONDON, 14th October, 1854. — It is this day mutually agreed between Messrs. R. Thompson & Sons, own-

ers of the good ship or vessel called the *Mary Graham*, whereof

is master, of the measurement," &c., "now at Sunderland, and Thomas Gillespie, of London, merchant, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall, with all convenient speed, at Sunderland, load from the factors of the said merchant, in the customary manner and in regular turn, a full and complete cargo of Londonderry or Lambton's Wallsend coals, whichever is readiest; which the said merchant binds himself to ship, not exceeding what she can reasonably stow and carry over and above her tackle," &c. "And, being so loaded, shall therewith proceed to Constantinople for orders, to deliver there, or Stenea or Beicos Bay, or at Varna, or a safe place in the Black Sea, or so near thereunto as she may safely get, and deliver the same, in her regular turn, into craft, steamer, or depot ship, at any wharf or pier where she may safely lie, as may be directed by the consignee, being paid freight on the quantity delivered in the manner after mentioned at the rate of 34*l.* per kiel of 21½ tons, if discharges at Constantinople, Stenea, or Beicos," &c. (other rates for a discharge elsewhere), "in full of all port charges, consulages, pilotages, Ramsgate and Dover dues; the act of God," &c., excepted. "The balance of freight to be paid by an approved bill on London, at three months' date from the production of the consignee's certificate of the right delivery of the cargo at as aforesaid, agreeably to bills of lading, or in cash equal thereto, at charterer's option." Then followed stipulations as to rate of unloading, running days for the same, and demurrage for excess; and other clauses not now material. "One-fourth of the freight to be advanced to the owner's agent in London, on the ship having sailed, less five per cent thereon for insurance, interest, and commission: penalty for non-performance of this agreement, the estimated amount of freight." Signed by defendant and plaintiffs. Averment: That the persons in the said charter-party mentioned and described as Messrs. R. Thompson & Sons, were and are plaintiffs, and that the person therein mentioned and described as Thomas Gillespie was and is defendant. That defendant caused the ship to be loaded with a full and complete cargo of coals, to wit, pursuant to the said charter-party; and that the said ship, being so loaded, sailed, to wit, for Constantinople, pursuant to the said charter-party. That plaintiffs did, and were ready to do, all things necessary on their part, and that all things necessary happened and were done, to entitle plaintiffs, to wit, by their agent in London, to receive, and to render defendant liable to pay to their agent in London, the one-fourth part of the said freight, by the said charter-party agreed to be advanced to the plaintiff's agent in London on the ship having sailed, less 5*l.* per cent thereon for insurance and commission. That the said one-fourth part of the freight, less 5*l.* per cent as aforesaid, amounted to a large, &c., to wit, 214*l.* Yet defendant hath not paid the same, or any part thereof, to plaintiffs, or to their agent in London.

Second count, for money payable by defendant to plaintiffs for freight for the conveyance by plaintiffs for defendant, at his request,

of goods in ships; and for money found to be due from defendant to plaintiffs on accounts stated between them.

Pleas: 1. To the first count: That the said ship did not sail as alleged.

2. To the first count: That the said ship was not, at the commencement of the said voyage, tight, staunch, and strong, and every way fitted for the voyage; and that, by reason of the premises, the said ship and the said cargo of coals were wholly lost.

3. To the first count: That the plaintiffs not only wrongfully and negligently sent the said ship, so loaded as in the said first count mentioned, out to sea in an unseaworthy state, and without a proper and sufficient crew to navigate her on the said voyage, and when she was not fitted for the said voyage, and at a time when it was very dangerous for the said ship to proceed to sea; but the defendant says that, after the said ship had been so as aforesaid sent to sea, and while she was on the high seas near to the sea-shore, the plaintiffs wrongfully and negligently caused and permitted the master of the said ship to leave the said ship, and go ashore, and wrongfully and improperly caused and permitted the said ship to be left there, to wit, on the high seas, near to the sea-shore, for a great length of time, without a master, without a proper and sufficient crew to manage and navigate her: during which time the said ship, by reason of the premises, sunk and was wholly lost; and the said cargo of coals was also, by reason of the premises, wholly lost.

4. To the residue of the declaration: Never indebted.

The plaintiffs joined issue on all four pleas, and also demurred to the second and third.

Joinder in demurrer.

The demurrer was argued in last Easter Term.

Atherton, for the plaintiffs. As to the second plea. The question on this demurrer is not whether the facts there stated afford ground for an action by defendant against plaintiffs, but whether they constitute a defence in this action. Now the first averment, that the ship was not seaworthy at the commencement of the voyage, is no answer to an action for freight, inasmuch as whether seaworthy or not she might still perform the voyage and earn freight; and the rules applicable to an ordinary action for freight must be applicable to an action like this for a portion of the freight. But then does the additional averment that the ship was lost by reason of the unseaworthiness aid the defence? Where a defendant sets up damage to himself as an answer to a declaration, he must at least show clear damage on his side equivalent to the damage sustained by the plaintiff. "A cause of action against a plaintiff will be no bar to an action by him for avoiding circuit of action, when the recovery in both actions is not equal." Note (2) to *Turner v. Davies*.¹ [*Manisty*, who was for the defendant, mentioned *Charles v. Altin*.² *LORD CAMPBELL*, C. J. The litigation is not put an

¹ 2 Wms. Saund. 150 b.

² 15 Com. B. 46.

end to unless the damages are equivalent.] Here the damage sustained by the loss of the cargo might be greater or less than the freight. It might happen that the cargo, on arriving at Constantinople, from the state of the market or other circumstances, was not worth the freight. [ERLE, J. Suppose the contract to be, if I give you a straw you shall give me 1,000*l.*: the giving of the straw is a condition precedent to getting the 1,000*l.* I think that is the rule applied to such mutual contracts as this.] That would be to construe this charter-party as making the contract to pay the freight in advance dependent on the fulfilment of a warranty. There are three cases: first, where the act of one party is a condition precedent to his calling on the other to act; secondly, where there are simply mutual stipulations; thirdly, where the performance of the two acts is to be simultaneous. The utmost that can be said is, that this is a case of the third kind; but how can the right to the advance of freight be simultaneous with a right to have the use of the ship during the whole voyage which is to ensue? [ERLE, J. The case seems to me to fall within the class of simultaneous acts; and if the sailing were illusory, the plaintiff's right would not arise.] The defendant might raise that point on a traverse of the sailing. [LORD CAMPBELL, C. J. There is a great difficulty in resting the defence upon the ground of avoiding circuitry; but it is a question whether the freight was ever earned. ERLE, J. Suppose the owner of the cargo had said, "I insist on the ship not sailing, for she is not seaworthy." I do not think the actual loss makes any difference.] Suppose the vessel to have sailed on the 1st of January, and not to have been lost till the 1st of March; would not the plaintiffs be entitled to recover the advanced freight? [ERLE, J. I am not prepared to answer in the affirmative: the loss is only evidence of the unseaworthiness.] According to that, the slightest want of completeness would be an answer? [ERLE, J. The question may be as to a substantial non-performance, as illustrated by the language of Lord Ellenborough in *Havelock v. Geddes*.¹ The condition precedent seems to be here a complex idea; the ship is to sail, being staunch, &c.] Suppose the action to have been brought the day after the ship had sailed, and the plea to have been that she did not sail, being staunch, &c., throwing the loss out of the question. [CROMPTON, J. There is an old case in *Shower*² which seems to show that where freight is advanced, if the ship be afterwards lost, the freighters cannot have their money back.]

The third plea shows only neglect subsequent to the vesting of the right of action. That, at the utmost, can be ground only for a cross-action.

Manisty, contra. As to the second plea. The contract was that the ship should sail in a state reasonably fit for the voyage. The quarter of the freight was to be advanced, subject to a deduction in respect of the insurance, interest, and commission, which would fall on the defend-

¹ See *Graves v. Legg*, 9 Exch. 709, 716.

² Probably the Anonymous Case in 2 Show. 283.

ant. But the insurance would be worthless unless the ship was seaworthy when she sailed. [LORD CAMPBELL, C. J. It has been held that an advance like this may be insured under the name of freight, though it is not strictly freight.¹ You suggest that the contract contemplates the defendant's keeping up a contract of insurance.] Yes: the deduction is partly for the purpose of enabling the defendant to insure. [LORD CAMPBELL, C. J. Or to stand as his own insurer.] That would be the same thing, so far as relates to the construction of the contract. The contract therefore must be understood to contain a warranty by the plaintiffs that the ship would sail in a proper state. [ERLE, J. Perhaps, according to a distinction which has been drawn, it is not so much a warranty as an element of the contract.] Even in the case of an action for the price of goods sold, it is competent to show that there is nothing recoverable because of the breach of a warranty. If it be necessary to inquire whether the plea is good for prevention of circuity of action, it is to be observed that *Charles v. Altin* is distinguishable. It was there held that a plea, in order to show a defence by way of avoiding circuity of action, must show that the cross-claim was for the same sum as that which the plaintiff demands. But that is so here; for the loss of the quarter freight to the defendant is that which the plaintiff, in respect of the identical contract, would have to make good in an action for sailing with the ship in an unseaworthy state; and to make two cross-actions necessary for the adjustment of this claim would be to incur what Lord Denman, in *Walmsley v. Cooper*,² calls "the scandal and absurdity of allowing A. to recover against B. in one action, the identical sum which B. has a right to recover in another against A." That something additional might be recovered in the cross-action can make no difference. [CROMPTON, J. What you would recover in the cross-action would be the value of the goods.] The jury would be bound to give the amount of the loss accruing from the payment of the quarter freight. [LORD CAMPBELL, C. J. That comes to a case of unliquidated damages; where the circuity of action principle applies, the cross-demand ordinarily sounds in debt.] Not invariably, as in the case of a covenant not to sue, or a contract to indemnify. [LORD CAMPBELL, C. J. It is certainly a reproach to our procedure that we cannot, as is done in other countries, always bring cross-demands to be settled at once.] *Connop v. Levy*³ furnishes a good instance of the defence which a contract to indemnify supplies.

The principle of avoiding circuity of action applies to the third plea as well as to the second.

Atherton, in reply. The amount sought by the plaintiff here possibly might, but need not necessarily, be the same as that which the defendant would recover in a cross-action. Where that is so, the principle of avoiding circuity does not apply. As to the other point, the sailing in a proper condition was not a condition precedent, but was the subject

¹ See *Hall v. Janson*, 4 E. & B. 500, 509.

² 11 A. & E. 218, 221, 222.

³ 11 Q. B. 789.

of a mutual stipulation: the quarter freight, if it had been paid on the ship sailing, could not have been recovered back on its being discovered, before the loss of the ship was known, that she had sailed in an unseaworthy state. The only argument that can be raised from the deduction in respect of insurance is, that both parties took for granted that the ship would be seaworthy at the time of sailing; but that does not make the seaworthiness a condition precedent. The sailing is a condition precedent, but not the sailing in any particular state of fitness.

Cur. adv. vult.

LORD CAMPBELL, C. J., now delivered the judgment of the Court.

This was an action by the owners of a ship on a charter-party, whereby it was agreed between them and the defendant that the ship, being tight, staunch, and strong, and every way fitted for the voyage, should at Sunderland load from the factors of the defendant a full cargo of coals, and, being so loaded, should therewith proceed to Constantinople for orders, and deliver the cargo there or at some port in the Black Sea, being paid freight on the quantity delivered at certain stipulated rates: "one-fourth of the freight to be advanced to the owner's agent in London, on the ship having sailed, less 5 per cent thereon for insurance, interest, and commission." The declaration alleged that the defendant caused the ship to be loaded with a cargo of coals, and "that the said ship, being so loaded, sailed, to wit, for Constantinople, pursuant to the said charter-party;" and that, although the plaintiffs had done every thing to entitle them to an advance of one-fourth of the freight, amounting to 214*l.*, the defendant had not paid the same or any part thereof to their agent in London.

The second plea was, "That the said ship was not, at the commencement of the said voyage, tight, staunch, and strong, and every way fitted for the voyage; and that by reason of the premises, the said ship and the said cargo of coals were wholly lost." To this plea there was a demurrer.

Upon the argument before us, in last Easter Term, the doctrine of circuity of action was relied upon. But we do not think it applicable, for the reasons stated in *Charles v. Altin*. We are of opinion, however, that this plea is a bar to the action, on the ground that it shows that the advance of freight had never become payable.

Freight, generally speaking, is not payable till the goods have been delivered at the port of destination. Here, by special stipulation, one-quarter of the amount was to be paid in advance on a certain event, viz., the ship having sailed from Sunderland for Constantinople, in pursuance of the charter-party. The charter-party required that when she sailed, she should be "tight, staunch, and strong, and every way fitted for the voyage." If she sailed on the voyage in a seaworthy condition, the merchant was to advance one-fourth of the freight, which he could not recover back if the ship, having so sailed, should afterwards be lost by the perils of the sea without having delivered any part

of her cargo. *Pro tanto* the risk was transferred from the shipowners to the merchant; and the arrangement between them was that the amount to be advanced was to be insured by him, as appears clearly from the deduction of 5 per cent for insurance, interest, and commission. By a policy of insurance, the merchant was to be indemnified to the extent of the sum he was to advance. But he could not have the benefit of this indemnity unless, at the commencement of the voyage, the ship was seaworthy. He must be considered to have promised to pay one-fourth of the freight in advance, if, when the ship sailed, she was in such a condition as that a policy of insurance on the freight would attach, and enable him to recover the money back in case of a subsequent loss. But the plea avers that the ship was not seaworthy at the commencement of the voyage, and that, by her unseaworthiness, the cargo of coals was wholly lost. It was argued, for the plaintiff, that the loss after the sailing is for this purpose immaterial, and that, although unseaworthy when she sailed, she might have completed the voyage and delivered the cargo in safety. In that case the full freight certainly would have been earned, and would have been payable: but still the conjuncture never would have arisen upon which a part of the freight was to be paid in advance. For these reasons we think that the second plea is sufficient.

There is a third plea, upon which, as it is demurred to, we are bound to give our opinion. This plea has some introductory observations about the ship having been sent to sea in an unseaworthy state, but it contains no allegation to that effect, and we consider the substance and gist of the plea to be that, after the ship sailed and while she was on the high seas, the plaintiffs were guilty of negligent and improper conduct with regard to the management of the ship, by reason whereof the ship and cargo were wholly lost. This plea, we think, is bad, as it admits that the ship sailed on the voyage from Sunderland in pursuance of the charter-party. If this be true, one-fourth of the freight thereupon became payable in advance; and any subsequent default or misconduct of the plaintiffs would only be the subject of a cross-action.

Judgment for defendant on the second plea; for the plaintiffs on the third.

ROLT v. COZENS.

IN THE COMMON PLEAS, MAY 28, 1856.

[Reported in 25 *Law Journal Reports*, *Common Pleas*, 254.]

THE declaration stated that by a certain agreement made and entered into by and between the plaintiff and certain persons named Burlington B. Wale and G. Dawe, it was agreed by Wale and Dawe that in consideration of the plaintiff, by the said agreement, agreeing to supply

one W. Fowler with timber and deal to the value of 200*l.*, the said Wale and Dawe severally agreed to guarantee to the plaintiff the due payment of any amount for such timber not exceeding 200*l.*, within six months from the sale of the said timber. That in pursuance of such agreement he the plaintiff did supply timber to the amount of 153*l.* 10*s.* 1*d.* to the said W. Fowler. That afterwards and whilst such timber was unpaid for, and before the period of six months from the date of the sale of the timber had elapsed, the plaintiff became and was dissatisfied with such guaranty so given by Wale and Dawe, and thereupon by another agreement (that on which the action was brought)¹ made and entered into by and between the plaintiff and the defendant in July, 1854, after reciting the said guaranty, and that the plaintiff had delivered timber to the amount of 153*l.* 10*s.* 1*d.* and that the plaintiff was not satisfied with such guaranty, the defendant at the request of the said Wale and Dawe, in consideration of the premises and of the plaintiff forbearing to take any proceedings against Wale and Dawe, guaranteed to the plaintiff the sum of 153*l.* 10*s.* 1*d.* on the 13th of December then next. Averment: that the plaintiff has done every thing, &c. Breach: non-payment.

Fourth plea: That the plaintiff has not done any thing on his part to entitle him to be paid by the defendant the said sum of 153*l.* 10*s.* 1*d.*, as the plaintiff did not forbear to take the said proceedings in the declaration mentioned against the said Wale and Dawe, but on the contrary took such proceedings before the said 13th of December next after the making of the said alleged agreement.

At the trial before Alderson, B., at the Spring Assizes for Surrey, 1856, the plaintiff had a verdict on all the issues except that upon the fourth plea. It was proved that before the 13th of December, namely, on the 8th of December, a writ had been issued at the suit of the plaintiff against Wale and Dawe. The learned judge ruled that proceedings had been taken, but it was contended for the plaintiff, that the not taking proceedings against Wale and Dawe was not a condition precedent to his right to recover. The jury found a verdict for the defendant on the fourth plea, leave being reserved to the plaintiff to move to enter a judgment with damages *non obstante veredicto*.

¹ And which was in the following terms: "Memorandum of agreement made this twenty-second day of July, 1854, between Peter Rolt, of Clement's Lane, timber merchant, trading under the style or firm of Thomas Brocklebank & Rolt, of the one part, and Thomas James Cozens, of, &c., of the other part: whereas, on the 13th of June, 1854, B. B. Wale and G. Dawe, in consideration of the said Peter Rolt agreeing to supply William Fowler with timber to the value of 200*l.*, severally agreed and guaranteed to the said Peter Rolt the said amount; and the said Peter Rolt has accordingly delivered timber to the amount of 153*l.* 10*s.* 1*d.*, and is not satisfied with such guaranty; and accordingly the said Thomas James Cozens, at the request of the said B. B. Wale and G. Dawe, has and does hereby agree, in consideration of the said Peter Rolt forbearing to take any proceedings against the said B. B. Wale and G. Dawe, to guarantee the payment of the said sum of 153*l.* 10*s.* 1*d.* on the thirteenth day of December next. This guaranty not to be prejudiced by the said Peter Rolt refusing and not delivering the remainder of the timber. As witness the hands of the parties, Thomas James Cozens." See 18 C. B. 676. — Ed.

A rule *nisi* was afterwards obtained to enter judgment for the plaintiff *non obstante veredicto*; or to set aside the verdict and enter a verdict for the plaintiff on the fourth plea, or for a new trial.

¹ *Garth* (May 28) showed cause. There are two questions in this case: first, whether judgment should be entered for the plaintiff on the issue on the fourth plea *non obstante veredicto*; and secondly, whether the plea was supported by the evidence. On the latter point the only ground of objection is, that issuing a writ is not "taking proceedings." The learned judge properly held that it was, and at all events the plaintiff is not entitled to a new trial. As to the judgment *non obstante veredicto*, it is moved for on the ground that not taking proceedings against Wale and Dawe was not a condition precedent to the plaintiff recovering, and the first rule in the note to *Pordage v. Cole*¹ is relied upon. But the proper construction of the guaranty upon which the action is brought is this, that if the plaintiff would forbear taking proceedings till the 13th of December, then the defendant would pay on the 13th. The defendant meant to say to the plaintiff, "You are to forbear to sue Wale and Dawe till the 13th of December," and that is the only actual consideration. If it be contended that "forbearing" means "agreeing to forbear," and that that was the consideration, it may be answered that the plaintiff himself, in setting out the legal effect of the guaranty in the declaration, speaks of "forbearing." Whatever proceedings the declaration speaks of as not to be taken, the plea alleges to have been taken. Whether the meaning is that the forbearance is to be forbearance generally, or till the 13th of December, the plea fixes it. It is said that forbearance for ever so short a time would have supported the guaranty: *Payne v. Wilson* and *Edwards v. Roberts*; ² but if the forbearance is to be construed as general forbearance, it must at all events have been forbearance up to the 13th of December; *Waters v. Glassop*.³

Bovill and C. Pollock. Both branches of the rule bear upon the effect of the guaranty. The forbearing is not a condition precedent; the covenants are independent; and "forbearing" means agreeing to forbear. In the cases cited on the other side the forbearance was to be for a time named. Where no specific time for forbearance is named, the forbearance must be general. Here a time is named for payment, but not for forbearance. But it makes little difference whether the agreement be to forbear generally, or up to a particular time. If the agreement be to forbear for six months, and there has been forbearance for five months, part of the consideration has passed. The plaintiff did forbear for a time, and did no act causing damage to the parties. The case is, therefore, within the third rule in *Pordage v. Cole*. Covenants going to part of the consideration are independent, as they were held to be in *Stavers v. Curling* and *Boone v. Eyre*. [WILLIAMS, J. In *Neale v. Ratcliffe* it was held that where the defendant undertook

¹ Wms. Saund. 320 b.

² 2 Mod. 24.

³ 1 Ld. Raym. 357.

to keep premises in repair, the same being first put in repair by the plaintiff, it was a condition precedent to put the whole of the premises in repair, and the covenant could not be divided.] The agreement there was to perform something in respect of a subject-matter when it came into existence, and was therefore different from the present.

JERVIS, C. J. It seems to me that this rule ought to be discharged. To my mind the second point, about part of the consideration having been given, does not arise. It would arise only if we should be of opinion that the guaranty was general, and intended to impose on the plaintiff continued forbearance. It seems to me that that is not so. The plaintiff said to the defendant, "If you will forbear till the 13th of December, and if Wale and Dawe do not pay you then, I will do so." The case is not distinguishable from *Neale v. Ratcliffe*.

CRESWELL, J., WILLIAMS, J., and WILLES, J., concurred.

Rule discharged.

ROPER v. LENDON.

IN THE QUEEN'S BENCH, APRIL 30, 1859.

[*Reported in 1 Ellis & Ellis, 825.*]

DECLARATION against the defendant, as secretary of the Kent Fire Insurance Company, on a policy of insurance against fire, effected by the plaintiff with the said company on the household furniture and effects, stock in trade, fixtures, and fittings in his dwelling-house. The declaration set out the policy, which was granted subject to certain conditions thereon indorsed, also set out, of which the following only are material:—

"Condition 10. The amount of every loss will be paid, without any discount or deduction, immediately after the same shall have been established to the satisfaction of the directors; but they reserve to themselves in all cases the option of reinstating within a reasonable time."

"Condition 15. All persons insured by this company sustaining any loss or damage by fire, shall forthwith give notice thereof to the directors or secretary of this company, at their office in Maidstone, and within fifteen days after such fire deliver in as particular an account of their loss or damage as the nature of the case will admit of, and shall also make proof of the amount of such loss or damage, by his, her, or their solemn declaration or affirmation, by their books or accounts, and by such other proper vouchers as shall be reasonably required. In case any difference or dispute shall arise between the insured and the company, touching any loss or damage, or otherwise

in respect of any insurance, such difference shall be submitted to the judgment and determination of two indifferent persons as arbitrators, of whom one shall be chosen by this company and the other by the insured, and such two arbitrators shall, previously to entering upon the reference, agree upon and nominate a third person to be an arbitrator with them; and the award in writing of any two of the three arbitrators so chosen shall be conclusive and binding on all parties; and if any fraud or false swearing shall appear on the part of the insured, and the same shall be certified in writing by any two of the said arbitrators, the party insured shall forfeit all claim under the policy."

The declaration then averred that, while the policy was in full force, the plaintiff sustained loss and damage by fire, on the property described in the policy, to the amount of the sums therein specified as the value thereof; that the plaintiff had done all things necessary to be done, and that all things had been done and had happened which were necessary to be done and to happen in order to entitle the plaintiff to have such loss and damage paid and made good to him by the company; and that the time for paying and making the same good elapsed before suit, of all which the company had notice; but that the company did not pay or make good the loss.

Demurrer to the declaration. Joinder in demurrer.

The defendant also pleaded six pleas, the second and sixth of which were as follows:—

Plea 2. That the plaintiff did not forthwith give notice of, or, within fifteen days after the said fire, deliver an account of his supposed loss or damage by fire as required by the said policy and condition in that behalf.

Plea 6. That this action is brought for and in respect of a difference and dispute between the said insured and the said company, touching the said loss and damage, within the meaning of the fifteenth of the conditions indorsed on the said policy; and that the said company have never declined, but have always been ready and willing, to refer such difference and dispute to the judgment and determination of two indifferent persons as arbitrators, in manner provided by the said condition, of all which the plaintiff before suit had due notice; and the said dispute or difference and the amount of the plaintiff's supposed loss or damage have never been determined as by the same condition is provided.

Demurrer to the second and sixth pleas respectively. Joinders in demurrer.

T. Jones (Northern Circuit), for the plaintiff. The pleas are bad. The second plea is founded on the fifteenth condition indorsed upon the policy; but the delivery within fifteen days of particulars of the loss is not thereby made a condition precedent to the plaintiff's right to sue. The other side will rely upon *Mason v. Harvey*, where the delivery of particulars of loss was held a condition precedent to the right of the insured to recover. But there is nothing in the judgment in that

case to show that the Court held that delivery within the time specified in the policy was essential; it may rather be inferred that they were of opinion that a delivery at any time before action would satisfy the condition. So, here, it is admitted, on the part of the plaintiff, that, under the present policy, a delivery of particulars of loss before suit is a condition precedent to his right of action. The decision in *Mason v. Harvey* is founded upon that in *Worsley v. Wood*, in which case no fixed time was specified in the policy as that within which the certificate of the minister, &c., of the parish was to be procured. [HILL, J. The condition here requires merely that "as particular an account of" the "loss and damage as the nature of the case will admit of," shall be delivered within fifteen days after the fire. A full statement is not asked for. The condition, if taken to require that some statement shall be furnished within fifteen days, appears reasonable enough. It must be very important to the company to have some statement given in as soon as possible.] Perhaps so; but surely if a statement is furnished within a reasonable time, it is sufficient. Why should the precise period of fifteen days be held to be essential? In *Wheelton v. Hardisty*¹ the truth of the statement as to the health of the assured was held not to be a condition precedent to the right to recover on the policy, because there were no words in the policy to give it that effect. So, here, the policy contains no words making the delivery of particulars within the period of fifteen days essential. [LORD CAMPBELL, C. J. The condition must be taken as a whole: having admitted that the delivery of particulars is essential, you are not at liberty to reject the stipulation that they are to be delivered within the fifteen days.] Then as to the sixth plea. This plea is bad. The provision contained in the same fifteenth condition, and upon which this plea is founded, as to a reference of disputes to arbitration, is not compulsory. *Scott v. Avery*² is conclusive to that effect. That case shows, that although, where an agreement to refer provides that no action shall be brought, until arbitrators have decided what amount is due, a reference and ascertainment of the amount due are conditions precedent to the right to bring an action, the same effect is not to be given to a mere collateral agreement to refer, such as that in the present case, which contains no such provision. In *Brown v. Overbury*,³ cited by Lord Campbell in his judgment in *Scott v. Avery*, the race was, by the rules, to be decided by the stewards, so that their decision was necessarily a condition precedent to the right of either party to the stakes. The defendant here, had he chosen, might, before pleading, have taken out a summons under the Common Law Procedure Act, 1854, sect. 11, to refer the question of amount. Not having done so, he cannot rely upon the sixth plea as constituting any defence to the action.

Lush, for the defendant, admitted that the sixth plea was bad. The Court did not call upon him to support the second plea.

¹ 8 E. & B. 232.

² 5 H. L. Ca. 811.

³ 11 Exch. 715.

LORD CAMPBELL, C. J. The second plea is clearly good. The whole of the fifteenth condition, relating to the delivery of particulars of loss, must be taken together, *tale quale*. When, therefore, it is conceded that a delivery of such particulars, before action, is essential, it follows, from the wording of the condition, that the delivery must be within fifteen days after the loss. And the condition so construed is a very reasonable one; it being obviously of great importance to the defendant's company to know as soon as possible after a loss the amount claimed by the assured. The sixth plea is as clearly bad. The agreement to refer, contained in the fifteenth condition, is merely collateral to the agreement to pay. The courts will not, therefore, treat the agreement to refer as ousting their jurisdiction until there has been a reference. The distinction between the present case and cases like *Scott v. Avery* is plainly pointed out in the judgment there delivered in the House of Lords. The present case does not fall within that decision, and the defendant could have enforced the agreement to refer only by an application under the Common Law Procedure Act, 1854, § 11.

(ERLE, J., and CROMPTON, J., were absent.)

HILL, J. I am of the same opinion. By the terms of the policy the conditions indorsed on the back are incorporated with it. The defendant's company agree to be liable only according to the tenor of those conditions. One of these conditions requires the assured, "within fifteen days after" a fire, to "deliver in as particular an account of their loss or damage as the nature of the case will admit of." The plaintiff has not done so; there must, therefore, be judgment for the defendant on the second plea. The sixth plea, however, is bad. The case is clearly not within the decision in *Scott v. Avery*. Here the agreement to refer is collateral to the agreement by the company to pay; there, the agreement was to pay only such a sum as the arbitrators should award. On this plea, therefore, there must be judgment for the plaintiff.

Judgment for the plaintiff on the demurrers to the declaration and to the sixth plea; and for the defendant on the demurrer to the second plea.

HOARE AND OTHERS v. RENNIE AND ANOTHER.

IN THE EXCHEQUER, NOVEMBER 14 & 16, 1859.

[Reported in 5 Hurlstone & Norman, 19.]

DECLARATION. First count: That, on the 21st of April, A.D. 1857, the defendants agreed to buy of the plaintiffs, and the plaintiffs then agreed to sell to the defendants, about 667 tons of hammered Swede

bar iron of certain sizes, then agreed on between the plaintiffs and the defendants, the said iron to be shipped from Sweden in the months of June, July, August, and September next, and in about equal portions each month, at 15*l.* 10*s.* per ton, delivered in good condition *ex ship*, on arrival in the port of London; and it was thereby then further agreed, amongst other things, that no shipment should exceed 150 tons, which should be in proportionate quantities of each size; but that, if any variation therein, it should not exceed one ton, and such variation to be corrected in subsequent shipments; that sellers should have the option of commencing shipments in May, 1857, and also of completing the whole by the end of July, 1857; that ships' names should be declared as soon as known to the sellers; that if any should be lost on the voyage the quantity lost should be null and void; and that there should be discount at the rate of two and a half per cent for cash against each delivery. Averments: That plaintiffs had done all things necessary on their part to be done, &c.; and though all things had happened and all times had elapsed to entitle them to have the said iron accepted, yet the defendants have wholly refused to accept the said iron or any part thereof, or to pay for the same according to the terms of the said agreement, whereby the plaintiffs lost divers profits, &c.

Second count: That on the 21st of April, A.D. 1857, the plaintiffs agreed to sell to the defendants, and the defendants agreed to buy of the plaintiffs, about 667 tons of hammered iron, upon the terms in the first count mentioned; and that from the time of the making the agreement continually until after the refusal, notice, and discharge hereinafter mentioned, the plaintiffs did and performed all conditions precedent, and all things were done, and all times elapsed, necessary to entitle them to the performance of the agreement on the part of the defendants; and that at and after the refusal, notice, and discharge hereinafter mentioned, they were ready and willing to perform the agreement on their part; and although the plaintiffs, in part performance of the said agreement, did, in June, A.D. 1857, ship a certain portion of the said iron, and did, in further performance of such agreement, and within a reasonable time after such shipment, tender to the defendants, and offered to deliver to them the said portion of iron so shipped as aforesaid, yet the defendants refused to accept the said portion of iron so tendered and offered, and thenceforth wholly refused to accept the same or any of the residue of the said iron, and gave notice to the plaintiffs that they would not accept the residue of the said iron; and the defendants thenceforth wholly refused to observe the agreement on their part, and wholly discharged the plaintiffs from the further execution and performance of the agreement by them; and wholly waived such execution and performance; whereby, &c.

Third plea to the first count: That the plaintiffs did not avail themselves of the option given to them by the agreement of commencing shipments of the iron in the month of May; and that the plaintiffs in the month of June shipped from Sweden, on board a certain vessel, a

quantity of the said iron so contracted for, to wit, 21 tons, 6 cwt., 1 qr., being a much less quantity than was required to be shipped during the said month of June according to the terms of the said contract, and gave notice to the defendants that the said iron was to be part of the iron so agreed to be sold as aforesaid; that the plaintiffs failed to complete the shipment for the month of June, according to the terms of the contract, and were never ready and willing to deliver to the defendants such a quantity of iron, shipped from Sweden in June, as is specified in the said contract, although none of the iron was lost during the voyage; and were not ready and willing to deliver to the defendants the said small quantity of iron which had been shipped during the month of June, until after the month of June had elapsed, and until after the defendants had notice that the plaintiffs were not ready and willing, and were unable to fulfil their part of the said agreement with reference to the quantity of iron to be shipped in June; and that the defendants, having notice of all the premises in this plea mentioned, did afterwards refuse to receive the said quantity of iron so shipped as aforesaid during the month of June, and did give notice to the plaintiffs that they refused to receive the residue of the said iron.

The sixth plea, to the second count, was similar to the third plea.

The plaintiffs demurred to the third and sixth pleas, and the defendants joined in demurrer.

Wilde (with whom was *Holland*), in support of the demurrer. The question is whether, upon the statement of the contract in the declaration, it appears that the shipment in about equal portions in each month is a condition precedent to the plaintiffs' right to sue for the non-acceptance by the defendants of what was actually shipped. The provision for the shipment in about equal proportions during each month is evidently not treated as being so essential as to go to the whole consideration of the contract. Great latitude is allowed to the sellers. They may begin the shipment in June and end in July, in which case they would ship about 333 tons in each month; or begin in May and end in September, when the quantity would be about 133 tons in each month. That shows that the gist of the contract was not that any definite quantity should be shipped in any particular month. If this is a condition precedent, though shipments had been made in due course in May, June, and July, if a short quantity was shipped in August, the defendants might say that the previous shipments were not under the contract. Therefore, according to the rules laid down on this subject in the notes to *Pordage v. Cole*¹ and *Cutter v. Powell*,² it will not be so construed. The price is 15*l.* 10*s.* a ton, to be paid on delivery. The time for the payment for the first parcel shipped might therefore arrive before any failure of the condition alleged to be precedent. No condition can be precedent unless the whole thing which is to be done is to be done precedently. In *Ritchie v. Atkinson*, on a

¹ 1 Wms. Saund. 320 *a.*

² 2 Smith's Lead. Ca. 1.

contract that a ship should go to St. Petersburg and there load from the factors of the freighters a complete cargo of hemp and iron, and proceed to London and deliver the same on being paid freight after certain rates per ton named in the contract, it was held that the delivery of a complete cargo was not a condition precedent, and that the master might recover for a short cargo at the rates mentioned, the freighter having his remedy in damages. Lord Ellenborough there pointed out that the defendant's argument must go the length of saying that if the cargo wanted a single ton of being a complete cargo that would be a defence. *Stavers v. Curling* was a similar decision upon a contract to procure a cargo of sperm oil, or as great a proportion as might be within the plaintiff's power to obtain. It is consistent with the allegations in the plea that the defendants have sustained no damage, because a parcel shipped on the 1st of July from one port might arrive before one shipped on the 30th of June from another port in Sweden. The plea should have shown or stated that the object of the contract was frustrated by the default: *Tarrabochia v. Hickie*, *Freeman v. Taylor*, *Graves v. Legg*. In *Glaholm v. Hays* the Court thought that an express stipulation that a vessel "shall sail" on a day named shows that particular importance is attached to it. In *Dicker v. Jackson* the delivery of an abstract, and deducing a clear title to an estate contracted to be sold, was held not to be a condition precedent to the right to maintain an action for the purchase-money, on the ground that the time for the payment of the money might happen before the time provided by the contract for the delivery of the abstract, &c., had arrived. [WATSON, B. Suppose no iron was shipped in June, July, or August, could the defendants have been compelled to accept the whole in September?] The substance of the contract is that the iron is to be delivered in four months, not month after month.

Bovill, in support of the pleas. The defendants have agreed to pay for certain goods to be shipped in June; the plaintiffs contend that the defendants must accept goods not shipped in June. The argument for the plaintiffs must go this length, that if they shipped no iron in June, July, or August, and but ten tons in September, the defendants would be bound to accept those ten tons. Surely that would not be in any sense a performance of the contract on the part of the plaintiffs. [POLLOCK, C. B. If the first parcel sent might have been according to the contract, can it be contended that the defendants could refuse to accept it on account of any subsequent default, as, for instance, if they afterwards discovered that the plaintiffs were not going to complete the June shipment?] In the present case, the defendants did not refuse to accept the shipment in question until after notice that the plaintiffs had broken their contract by not shipping the right quantities in June; in other words, "until after the defendants had notice that the plaintiffs were not ready and willing, and were unable to fulfil their part of the agreement?" The option being to accelerate the deliveries, any presumption that the plaintiffs were at liberty to retard the shipments is excluded.

Under an ordinary mercantile contract for goods to be supplied in June, the buyer would not be bound to accept them if tendered in July. In *Ritchie v. Atkinson* the cargo had been accepted by the defendants. In *Stavers v. Curling* the agreed voyage had been performed, and the owners had had the benefit of the cargo. The breach of the agreement to be frugal of stores was a small part only of the consideration. Here there had been no tender before the plaintiffs had entirely failed to perform their part of the agreement. The quantity to be shipped, and the time in which it was to be shipped, were of the essence of the contract. That brings the case within the authority of *Freeman v. Taylor*, and distinguishes it from *Tarrabochia v. Hickie*. The cases on charter-parties are uniform that where a time is mentioned for the being ready to load or the like, it is of the essence of the contract. *Glaholm v. Hayes*, *Ollive v. Booker*, *Oliver v. Fielden*. The principle which governed *Ellen v. Topp*, and *Graves v. Legg* applies, because the tender was not a partial performance of the contract, but an offer or readiness to do something which was no performance of the contract at all. [POLLOCK, C. B. The principle of *Boone v. Eyre* applies to the partial breach of a single contract, but surely not to a breach of a continuing contract, as to supply goods from day to day or from week to week, where during the contract one party becomes wholly incapable of performing his part. Suppose in June the plaintiff had shipped nothing, could he say, I will pay damages for that, and insist on going on with the contract and supplying the rest of the iron in July, August, and September? In such a case, if one fails on his part, the other cannot insist that the contract shall go on. It may be different if a partial performance has been accepted.]

Wilde replied (Nov. 15). The doctrine of conditions precedent never has been applied where continuous acts are to be performed. In *Withers v. Reynolds*, where the defendant had agreed to supply straw at a certain price per load, and the plaintiff always insisted on keeping one payment in arrear, it was held that, on the plaintiff's refusal to pay, the defendant was not bound to send any more; but *Patteson, J.*, said, "If the plaintiff had merely failed to pay for any particular load, that of itself might not have been an excuse to the defendant for delivering no more straw; but the plaintiff expressly refuses to pay for the loads as delivered." In the present case the defendants cannot avoid the contract altogether because the shipments in some one month are not in all respects according to the contract. The quantity shipped in June is not said to have been an unreasonable quantity for shipment in that month. [POLLOCK, C. B. The expressions in the contract are loose, and allow some latitude to the plaintiffs, but not so as to permit them to ship twenty tons in the month instead of 160. *Watson, B.* The pleas aver that the shipment was not according to the contract.]

POLLOCK, C. B. We are all agreed that the defendants are entitled to judgment upon the pleas. The foundation of my opinion is shortly this, that a man has no right to say that which is a breach of an agree-

ment is a performance of it. On that ground, this case is distinguishable from almost every other which has been cited. It does not turn upon any question of condition precedent. The only question is whether, if a man who is bound to perform his part of a contract does not do so, he can enforce the contract against another party. The plaintiffs contracted with the defendants to ship a large quantity of iron in June, July, August, and September, about one-fourth part in each month; but instead of shipping about 160 tons in June, as they should have done, they shipped little more than twenty tons, as a performance of the contract. The first count states that the plaintiffs performed all things necessary on their part to be performed, that they were ready and willing to do all things which according to agreement it was necessary they should be willing to do, and that all things happened to entitle the plaintiffs to a performance of the agreement on the part of the defendants. This is denied by the plea. The second count states that the plaintiffs, in part performance of the contract, shipped a certain portion of the iron, and in further performance of the agreement tendered and offered to deliver the said portion so shipped, yet defendants refused to accept the same. The pleas raise the question whether the defendants were bound to accept and pay for what was sent and tendered; the plaintiffs having, in June, shipped from Sweden a quantity much less than they were bound to have shipped, and the defendants having insisted that this was a breach of the contract, and given notice that they refused to accept the residue. The pleas expressly state that the plaintiffs were not ready to deliver such a quantity of iron shipped from Sweden in June as is specified in the contract, and were not ready and willing to deliver the small quantities shipped until after the month of June had elapsed, and until after the defendants had notice that the plaintiffs were not ready and willing to perform their part of the agreement. The only question we have to deal with is whether, on a contract like this, if the sellers at the outset send a less quantity than they are bound to send, so as to begin with a breach, they can compel the purchasers to accept and pay for that the sending of which was a breach and not a performance of the agreement. The argument on the part of the plaintiffs is that this was not a condition precedent. I do not think that is the test. It was said that if the plaintiffs had sent the one-hundredth part, instead of one-fourth part, in June, the defendants' remedy would have been by a cross-action. The case was put of the plaintiffs sending a short quantity after one shipment had been accepted. Possibly that might have made a difference. Where a person has derived a benefit from a contract he cannot rescind it, because the parties cannot be put *in statu quo*. Probably, therefore, in such case the defendants could not have repudiated the contract, and must have been left to their cross-action. Here, however, the defendants refused to accept the first shipment, because, as they say, it was not a performance, but a breach of the contract. Where parties have made an agreement for them-

selves, the courts ought not to make another for them. Here they say that in the events that have happened one-fourth shall be shipped in each month, and we cannot say that they meant to accept any other quantity. At the outset, the plaintiffs failed to tender the quantity according to the contract: they tendered a much less quantity. The defendants had a right to say that this was no performance of the contract, and they were no more bound to accept the short quantity than if a single delivery had been contracted for. Therefore the pleas are an answer to the action.

WATSON, B. I am of the same opinion. (His lordship read the contract stated in the declaration.) The contract is for the shipment of a quantity of iron in certain proportions, to be paid for on delivery. On performance of the contract the defendants agree to pay for the iron. The breach charged here is that the defendants shipped a small quantity in June, and declared that they would not ship more [*sic*]. The pleas aver that the shipment was not according to the contract. The obligation on the part of the defendants is merely to receive and pay for the goods according to the contract. Looking at the contract, the options given are all for the purpose of accelerating the shipments. Instead of shipping in June, the plaintiffs may ship a portion in May. The plaintiffs might have accelerated, but had no right to delay the delivering of the iron. Having done so, they have not performed their contract. The substance of the agreement in *Ritchie v. Atkinson* was that the plaintiff should go to Russia and bring home a cargo; and that was done; though, in consequence of the embargo, a full cargo had not been loaded. A similar observation applies to *Boone v. Eyre*. But on the sale of goods where the price is to be paid on delivery, can it be said that there is no condition to deliver them? Therefore, the defendant was not obliged to accept a small portion of that which should have been the shipment in June.

CHANNELL, B. On the pleas the defendants are entitled to judgment. The substantial question is, whether the defendants were bound to accept the portion which was tendered at the time at which it was tendered. That does not depend on the month in which it was tendered, but on the position of the parties at the time of the tender, by which the defendant was placed in the same situation as if, at the time of the tender, notice had been given to him that there would be no further shipment in all June. I think that there was not in the month of June such a shipment as was made necessary by the contract. Mr. Wilde admitted that the pleas might have been good if they had contained an averment to that effect. In some cases such an averment may be necessary. It would be so here, but that this is substantially a contract to ship one-fourth of the iron in June. There are options to vary the time of performance, which gave the plaintiffs the right to accelerate but not to delay it. The plaintiffs have not performed their part of the contract, and the defendants have not accepted anything which can be construed as an imperfect execution of the contract by the

plaintiffs. The defendants were thus at liberty to rescind the contract; and our judgment must therefore be for the defendants upon the demurrer to the pleas.

Judgment for the defendants.

BEHN v. BURNES.

IN THE QUEEN'S BENCH, JANUARY 21, 1862.

[*Reported in 1 Best & Smith, 877.*]

IN THE EXCHEQUER CHAMBER, FEBRUARY 24, 1863.

[*Reported in 3 Best & Smith, 751.*]

THE declaration alleged that the plaintiff and the defendant agreed by charter-party that the plaintiff's ship, called the *Martaban*, then in the port of Amsterdam, and being tight, staunch, strong, and every way fitted and ready for the voyage, should, with all possible despatch, proceed direct to Newport, Monmouthshire, and that the defendant should there load her with a full cargo of coals, which she should carry to Hong Kong and there deliver, in consideration of freight to be paid after the rate of sixty shillings sterling for every ton of twenty hundred-weight of coals so delivered, and at the times and in the manner following, that is to say: one-third by charterer's acceptance at three months' date from the final sailing of the vessel, or at the owner's option in cash, under discount of two and half per cent; one-third by charterer's acceptance at six months' date, the charterer to insure the amount and deduct the cost of insurance; and the remaining one-third of the freight by the charterer's acceptance at three months' date from the delivery to the charterer in London of a certificate in writing, signed by the consignee, of the right and true delivery of the cargo agreeably to bills of lading, or in cash under discount of five pounds per cent per annum, at charterer's option; and that the defendant should be allowed ten days for loading, and should receive the said cargo as delivered from on board at the rate of not less than thirty-five tons a working day, weather permitting, or in default should pay demurrage at the rate of four pence per ton register per like day. Averment of performance by the plaintiff and default by the defendant.

Plea: That at the time of making the charter-party time was an essential and material part of the contract, and the then situation of the ship was a material and essential part of the contract, as the plaintiff and defendant respectively then well knew, and that the said ship was not, at the time of making the said charter-party, in the port of Amsterdam, of which the defendant then had no knowledge or notice.

Issue.

The following special case, of which the pleadings were to be deemed part, was stated by consent of the parties under the order of a judge:—

By memorandum of charter-party, dated London, the 19th October, 1860, the plaintiff's ship, Martaban, was chartered to the defendant in the words and figures following, viz.: "It is this day mutually agreed between A. Behn, Esq., owner of the good ship or vessel called the Martaban, of 420 tons or thereabouts, now in the port of Amsterdam, and James Burness, Esq., of London, merchant, that the said ship, being tight, staunch, strong, and every way fitted and ready for the voyage, shall, with all possible despatch, proceed direct to Newport, Monmouthshire, addressing to Messrs. G. W. Jones & Co., for entering and clearing, and there load in the usual and customary manner in ten days, at any one of the usual loading places freighter may name, a full and complete cargo of coals, which said freighter binds himself to ship, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions and furniture (the captain to have a sufficient quantity of coal on board at port of loading for ship's use for the voyage, and have the same indorsed on bills of lading, independently of the cargo); and, being so loaded, shall therewith proceed to Hong Kong, or so near thereunto as she may safely get, and deliver the same alongside any craft, steamer, floating depot, or pier named by the consignee, notice to be given to the agent or consignee of the vessel being ready to discharge (the act of God, the Queen's enemies, riots and strikes of pitmen, fire, and all and every other dangers and accidents of the seas, rivers, and navigation always mutually excepted); the freight to be paid on the quantity delivered in accordance with this charter, at and after the rate of sixty shillings sterling per ton of twenty hundred-weight in full of all port charges, wharfage, consulage, pilotage, Ramsgate and Dover dues, and to become due, say one-third by charterer's acceptance at 3 months' date from the final sailing of the vessel, or at owner's option in cash, under discount at $2\frac{1}{2}$ per cent; one-third by charterer's acceptance at 6 months, the charterer to insure the amount and deduct the costs of insurance; the remaining one-third of the freight, less the cost of any coals short delivered at the port of final discharge, and after deducting such cash as may be advanced by the agent of the charterer for ship's use, which the captain is at liberty to draw to extent of 200*l.* on usual terms against captain's draft on charterer at 90 days' sight, to be paid by the charterer at 3 months' date from the delivery to the charterer in London of a certificate in writing signed by the consignee, of the right and true delivery of the cargo agreeably to bills of lading, or in cash under discount at 5 per cent per annum, at freighter's option. The vessel to deliver as customary, and the cargo to be delivered by the captain and received by the consignee at the rate of not less than 35 tons a working day, weather permitting, or to pay a demurrage at the rate of four pence per ton register per like day. The vessel to be addressed to freighter's agents inwards

only at the port of discharge, free of commission, but paying 2 per cent to charterer in London, same to be deducted from first payment of freight: any claim of average to be settled according to the custom at Lloyds: a commission of 5 per cent on amount of freight is due by the owner on signing this charter-party to David Brown, ship-broker, London, and to whom the ship is to be addressed on her return to London: penalty for non-performance of this agreement, estimated amount of freight."

The ship *Martaban* arrived on the previous 15th October, 1860, at Nieuwdiep, at the entrance to the Great Noord Hollandische Canal, on her way with a cargo from Sourabaya to the docks at Amsterdam, which, under favorable circumstances, she could have reached in twelve hours more; but in consequence of strong gales from the opposite quarter, and the absence of steam-tug power, she was unavoidably prevented from reaching the place of discharge in the Amsterdam Docks before daybreak on the twenty-third day of the same month of October. Nieuwdiep, the place where the vessel was unavoidably detained by the circumstances aforesaid on the said nineteenth day of October, the date of the above recited memorandum of charter-party, is a place in the direct course of the said vessel to Amsterdam, and is sixty-two English miles from that place, but is not within the port of Amsterdam.

The ship *Martaban*, having discharged her cargo with all possible despatch, was immediately made ready for sea, and without any delay sailed on the sixteenth day of November, and proceeded direct for Newport, pursuant to the charter-party, and arrived there on the first of December following. Notice was given to the defendant's agent at Newport, on the fifth day of the same December, that the ship was ready to receive cargo, and on the 16th December the stipulated lay days expired. The defendant continually, up to the expiration of the said lay days and afterwards, refused to load the ship. The plaintiff, as soon as possible thereafter, namely, on the 20th December, rechartered the vessel for Hong Kong from Newport, with a cargo of coals, at a smaller rate of freight than the defendant had agreed to pay, being at the time the highest that could be obtained; and thereupon the vessel, having loaded with all possible despatch, sailed without delay for Hong Kong.

The following statement is added at the request of the defendant's counsel, and under protest by the plaintiff's counsel:—

Before the charter was made, the defendant told the plaintiff's broker that he, the defendant, had a contract with the English government to supply coals at Hong Kong in China, and that he was taking up the ship for the purpose of fulfilling that contract. The defendant did not state that there was any limit of time for the performance of the contract with the government, but he said that there had been so much delay in the sailing of the ships previously taken up, he would not take up any which he was not certified was ready, or as near as possible ready.

The question for the opinion of the Court is, Whether the words "now in the port of Amsterdam" in the said charter-party amount to a warranty; and, if so, whether the position of the ship Martaban on the nineteenth day of October amounted under the circumstances to a breach of that warranty.

If the Court shall be of opinion, that the plaintiff is entitled to recover, the question of damages is to be referred to the master, and judgment to be entered for the plaintiff for such damages and costs of suit.

If the Court shall be of opinion that the plaintiff is not entitled to recover, then judgment of *nolle prosequi*, with costs of defence, shall be entered up for the defendant.

Manisty (*Maclachlan* with him), for the plaintiff. The words in this charter-party, "now in the port of Amsterdam," do not constitute a warranty or condition precedent to the contract that the ship was there at the time of the execution of the instrument; and, if they did, here was no breach of it. The rule in construing contracts of this nature is to look to the intention of the parties as collected from the instrument. Here the intention was that the statement of the position of the ship should be mere matter of description, and if any damage resulted to the charterer from his object being frustrated in consequence of her not being in that position at the time, his remedy should be by a cross-action for damages; and this construction is in accordance with that put on instruments of this nature in *Ritchie v. Atkinson*, *Freeman v. Taylor*, *Clipsham v. Vertue*, *Barker v. Windle*.¹ *Dimech v. Corlett*,² where the previous cases are reviewed, is an express authority on the point. [*CROMPTON, J.* *Ollive v. Booker*, decided eleven years before, seems the other way. His lordship also mentioned *Boone v. Eyre*. *WIGHTMAN, J.*, referred to *Kenyon v. Berthon*³ and *Colby v. Hunter*.⁴] Those two cases were on policies of insurance, which are a very different thing, for there the whole risk and premium depends on the representation. Great inconvenience would result from holding such matters as these conditions precedent; for if the statement as to the exact position of the ship or the time of her sailing is to be deemed part of the essence of the contract, the variance of a few yards or minutes would vitiate the whole. Moreover, if the words, "now in the port of Amsterdam," are to be construed as amounting to a condition precedent, a similar construction ought to be put on the other words in the same sentence, being "tight, staunch, strong, and in every way fitted and ready for the voyage," which is contrary to *Tarrabochia v. Hickie*.

The verbal statement introduced into this case under protest ought not to be attended to: the doing so would have the effect of importing a verbal statement into a charter-party. *Hurst v. Usborne*.⁵ [*WIGHTMAN, J.* The new matter introduced makes no difference, because it says, the ship must be "ready, or as near as possible ready."]

¹ 6 E. & B. 675.

² 12 Moo. P. C. C. 199.

³ 1 Dougl. 12, note (4)

⁴ 1 Mood. & M. 81.

⁵ 18 C. B. 144.

F. M. White (*Honyman* with him), contra. The statement of the position of the ship in this charter-party is a warranty that she was at that place at the time, and the facts show a breach of it. The rule has been correctly stated by the other side, that the thing to be looked to is the intention of the parties as collected from the instrument. It is to be observed that the words here are not the usual ones, that the ship shall proceed on her voyage "with all convenient speed," but "with all possible despatch." *Ollive v. Booker* is an authority in point for the defendant; and there are several other instances where statements of this nature have been held to amount to conditions precedent: *e. g.*, that a ship shall answer a particular description, *Hurst v. Usborne*; that she shall be seaworthy when about to sail, *Thompson v. Gillespy*; that she shall sail on a particular day, *Cranston v. Marshall*; ¹ *Croockewit v. Fletcher*; ² that she shall be ready to receive cargo at a certain time, *Oliver v. Fielden*; and that goods are on passage at the time of sale, *Gorrissen v. Perrin*.³

As to the authorities which have been cited by the other side, *Dimech v. Corlett* was decided on its peculiar circumstances; *Ritchie v. Atkinson* was an action for freight, and there had been a part-performance, and it is distinguished on that ground in *Glaholm v. Hays*. *Barker v. Windle*, in the Exchequer Chamber, is more fully reported, 25 L. J. Q. B. 349, *nom. Windle v. Barker*, from whence, and especially from the judgment of Martin, B., it appears that the question there was one of fact rather than of law: besides, the ship was only described as being of the specified size or "thereabouts," so that there could be no pretence for suggesting a warranty as to size.

Manisty, in reply. It is doubtful whether *Cranston v. Marshall* and *Croockewit v. Fletcher* will stand, if brought before a higher tribunal. If they do, it will be on the ground taken in *Tarrabochia v. Hickie* and *Seeger v. Duthie*, that a contract that a ship shall sail on a given day is a warranty, although a contract that she is to sail "within a reasonable time," or "with all possible despatch," is not. If the words here amount to a warranty, no qualification can be grafted on it, for a warranty must be taken *in omnibus*.

COCKBURN, C. J. Our judgment should be for the plaintiff. I feel considerably embarrassed by the conflict of authority which we find in the cases that have been brought under our attention in the course of the learned arguments on both sides.

Ollive v. Booker appears to me directly in point. The statement in the charter-party there was that the ship, relating to which the question arose, was then "at sea, having sailed three weeks ago;" and the Court of Exchequer held that that fact was a condition precedent to the enforcing of the contract by the ship-owner against the charterer. On the other hand, *Dimech v. Corlett* appears also in point to this case, and is in conflict with the preceding one of *Ollive v. Booker*. In *Dimech*

¹ 5 Exch. 395.² 1 H. & N. 893.³ 2 C. B. N. S., 681.

v. Corlett, the representation was that the vessel, the subject of the charter-party, was then at anchor at a given place, and it appeared that, so far was that from being the fact, she was in dry dock and undergoing the process of being sheathed in copper; and the contract was that she, being in the position described, should sail "with all convenient speed." The Privy Council held that her being in that position was not a condition precedent; that if she was not there, it was merely matter of cross-action for damages; or that, if the object of the voyage was frustrated, it might be a good answer to an attempt of the shipowner to enforce the contract against the charterer.

In this conflict of the decisions the right course for this Court is to abide by the later decision, which is also that of a court of very high authority, and one or more of the members of which were particularly conversant with shipping law.

I own if this question were *res integra* I should be much disposed to think that the best mode of construing these charters, where there is a representation as to the place of a ship, or as to the time of sailing, or analogous matter, would be to hold that, if the fact represented turns out not to be correctly stated, and in consequence of it the charterer finds himself in a position where his speculation and enterprise may be frustrated, and the contemplated advantages of them converted into disaster and loss, that should justify him in repudiating the contract. But, on the other hand, where the representation is that the ship is at a given place, or is to sail on a given day, &c., and it turns out that she was not there, or could not sail for some short time after that specified, &c., and there is no real frustration of the objects of the charterer, and little or no damage has been done to him, he should be left to his action. I throw this out with a view to legislation rather than to interpretation of the law; supposing no authority on the subject. I do not feel it at all necessary to express judicially any opinion upon it; I only say that here is a conflict of authority, and I will abide by the latest decision. I sincerely hope that the parties will go to a court of error, where the law may be satisfactorily settled.

I have to say on the part of my brother Wightman,¹ that he thinks we ought to abide by the cases referred to by Mr. White, and ought not to overrule them on the opinion of the Privy Council.

CROMPTON, J. The difficulty here is that there are so many of these decisions, and it is not easy to reconcile them. I join in the opinion of my Lord Chief Justice that this case should go to a court of error, which will be less hampered by contradictory decisions, and able to lay down the law more authoritatively than we can, who are only a court of co-ordinate jurisdiction. Many of the cases justify my brother Wightman in his doubts, but I agree with the view of my Lord Chief Justice. I think it lies on the party setting up this kind of statement as a condition precedent to show that it is one, *i. e.*, that the parties

¹ Wightman, J., had left the court before the judgment.

intended that there was to be no contract unless the stipulation was performed to the letter. Now, looking at the earlier authorities, I cannot help thinking that the law on this subject is a branch of the general law as laid down in *Boone v. Eyre*. Lord Mansfield there says, "The distinction is very clear, where mutual covenants go to the whole of the consideration on both sides they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent." Here a very minute matter, such as a discrepancy of a day or an hour, would be a breach, if the statement is to be taken as a condition precedent; which is the proper expression as stated by my brother Williams in *Barker v. Windle*,¹ in the Exchequer Chamber, who points out that "warranty" is not the correct one, for if there is a warranty the party must sue on it.

The early cases bear very much the aspect that things of this kind are to be looked on as matter of stipulation merely, unless you can see very clearly from the terms of the instrument that it was the intention of the parties not to be bound, unless they were performed to a hair's breadth. The words in the present charter-party, that the ship was to sail "with all possible despatch," created my chief doubt: but it is too slight to act on. Now *Ollive v. Booker*, which was decided about eleven years ago, and some other cases, varied the old notion about independent stipulations. I was never quite satisfied with them, but should feel bound by them. *Ollive v. Booker* is very near the present case, but *Dimech v. Corlett* is still nearer, for it is almost word for word. I should not like to found my judgment on any minute or fine-spun difference between those two cases; yet, when we look at the decisions which have taken place within the last two or three years, we must consider *Ollive v. Booker* as in some degree shaken, and that they are, I think, nearer to what the law ought to be. At all events, we must go by the latest authority, and leave the question to the Exchequer Chamber.

MELLOR, J. With very considerable hesitation I have arrived at the same conclusion with my Lord Chief Justice and my brother Crompton. I cannot distinguish this case from *Ollive v. Booker*. That case has, however, been broken in on by the subsequent decision in *Dimech v. Corlett*, and I shall therefore abide by that decision. I should have been glad if *Ollive v. Booker* had been alluded to in the judgment there, and the distinction between the cases pointed out. I consider that the onus of proving this statement to be a condition precedent lies on the person who asserts it to be such. Looking at the charter-party, I do not think this is a condition precedent, and rather think it is not.

Judgment for the plaintiff.

The defendant having brought error on the foregoing judgment,

¹ 6 E. & B. 675, 679.

Honyman (*Lovill* with him), for the defendant, cited *Cockburn v. Alexander*,¹ *Glaholm v. Hays*, *Ollive v. Booker*, *Oliver v. Fielden*, *Tarabochia v. Hickie*, *Croockewit v. Fletcher*, *Hurst v. Osborne*, *Cranston v. Marshall*, *Bannerman v. White*,² *Van Baggen v. Baines*.³

Munisty (*Maclachlan* with him), contra, cited *Freeman v. Taylor*, *Seeger v. Duthie*, *Barker, Appellant, v. Windle*, *Respondent*, *Glaholm v. Hays*, *Elliot v. Von Glehn*,⁴ *Dimech v. Corlett*.

Honyman, in reply.

Cur. adv. vult.

The judgment of the Court was now delivered by

WILLIAMS, J. The question in this case is, whether the statement in the charter-party, that the ship is "now in the port of Amsterdam," is a "representation" or a "warranty," using the latter word as synonymous with "condition," in which sense it has been for many years understood with respect to policies of insurance and charter-parties.

It may be expedient to commence the consideration of this question by some examination into the nature of representations. Properly speaking, a representation is a statement or assertion, made by one party to the other, before or at the time of the contract, of some matter or circumstance relating to it. Though it is sometimes contained in the written instrument, it is not an integral part of the contract; and, consequently, the contract is not broken, though the representation proves to be untrue; nor (with the exception of the case of policies of insurance, at all events, marine policies, which stand on a peculiar anomalous footing) is such untruth any cause of action, nor has it any efficacy whatever, unless the representation was made fraudulently, either by reason of its being made with a knowledge of its untruth, or by reason of its being made dishonestly, with a reckless ignorance whether it was true or untrue. (See *Elliot v. Von Glehn*, *Wheelton v. Hardisty*.⁵)

If this be so, it is difficult to understand the distinction which is to be found in some of the treatises, and is in some degree perhaps sanctioned by judicial authority (see *Barker, Appellant, v. Windle, Respondent*), that a representation, if it differs from the truth to an unreasonable extent, may affect the validity of the contract. Where, indeed, the representation is so gross as to amount to sufficient evidence of fraud, it is obvious that the contract would, on that ground, be voidable.

Though representations are not usually contained in the written instrument of contract, yet they sometimes are. But it is plain that their insertion therein cannot alter their nature. A question, however, may arise, whether a descriptive statement in the written instrument is a mere representation, or whether it is a substantive part of the contract. This is a question of construction which the Court and not the jury must determine. If the Court should come to the conclusion that

¹ 6 C. B. 791.

⁴ 13 Q. B. 632.

² 10 C. B. N. s. 844, 850.

⁵ 8 E. & B. 232; on appeal, 8 id. 285.

³ 9 Exch. 523.

such a statement by one party was intended to be a substantive part of his contract, and not a mere representation, the often discussed question may, of course, be raised, whether this part of the contract is a condition precedent, or only an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for a compensation in damages. In the construction of charter-parties this question has often been raised, with reference to stipulations that some future thing shall be done or shall happen, and has given rise to many nice distinctions. Thus, a statement that a vessel is to sail, or be ready to receive a cargo, on or before a given day, has been held to be a condition (see *Glaholm v. Hays*, *Oliver v. Fielden*, *Croockewit v. Fletcher*, *Seeger v. Duthie*), while a stipulation that she shall sail with all convenient speed, or within a reasonable time, has been held to be only an agreement (see *Tarrabochia v. Hickie*, *Dimech v. Corlett*, *Clipsham v. Vertue*). But with respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine, established by principle as well as authority, appears to be, generally speaking, that if such descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty, that is to say, a condition, on the failure or non-performance of which the other party may, if he is so minded, repudiate the contract *in toto*, and so be relieved from performing his part of it, provided it has not been partially executed in his favor. If, indeed, he has received the whole or any substantial part of the consideration for the promise on his part, the warranty loses the character of a condition, or, to speak perhaps more properly, ceases to be available as a condition, and becomes a warranty in the narrower sense of the word, viz., a stipulation by way of agreement, for the breach of which a compensation must be sought in damages (see *Ellen v. Topp*, *Graves v. Legg*, adopting the observations of Serjt. Williams on the case of *Boone v. Eyre*, in 1 Saund. 320 d. 6th ed. ; *Elliot v. Von Glehn*). Accordingly, if a specific thing has been sold with a warranty of its quality, under such circumstances that the property passes by the sale, the vendee having been thus benefited by the partial execution of the contract, and become the proprietor of the thing sold, cannot treat the failure of the warranty as a condition broken, unless there is a special stipulation to that effect in the contract: see *Bannerman v. White*; but must have recourse to an action for damages in respect of the breach of warranty. But in cases where the thing sold is not specific, and the property has not passed by the sale, the vendee may refuse to receive the thing proffered to him in performance of the contract, on the ground that it does not correspond with the descriptive statement, or, in other words, that the condition expressed in the contract has not been performed. Still, if he receives the thing sold, and has the enjoyment of it, he cannot afterwards treat the descriptive statement as a condition, but only as an agreement, for a breach of which he may bring an action to recover damages.

In the present case, as the defendant has not received any benefit or advantage under the contract, but has wholly repudiated it, the question is simply, whether, in the true construction of the charter-party, the Court ought to infer that the statement as to the ship's being at that date in the port of Amsterdam was meant to be a substantive part of the contract, or a representation collateral to it. And this question appears to be properly raised by the averment in the plea, that time and the situation of the vessel were essential and material parts of the contract. On the trial of the issue joined thereon, it was no part of the judge's duty to leave to the jury any question as to the construction of the contract, or the materiality of any of its statements. It was his function to construe the contract with the aid of the surrounding circumstances found by the jury, and to decide for himself whether the statement that the ship was in the port, supposing it to be untrue, was an essential part of the contract, or a mere representation, and to direct the jury to find for the defendant or plaintiff accordingly. The question, it should seem, might also be raised by pleading the material circumstances (as was done in *Graves v. Legg*) on which the defendant relies as leading to the construction which the plea seeks to put on the instrument. Unless one or other of these modes of pleading were adopted, the Court, in case there should be a demurrer to the plea, or on an application for judgment *non obstante veredicto*, would be precluded from taking the surrounding circumstances into consideration in aid of the construction.

It is plain that the Court must be influenced in the construction, not only by the language of the instrument, but also by the circumstances under which and the purposes for which the charter-party was entered into. For instance, if it was made in the time of war, the national character of the vessel is of such importance that a statement of it in the charter-party might properly be regarded as part of the shipowner's contract, and so amounting to a warranty; whereas the very same statement in the time of peace, being wholly unimportant, might well be construed to be a mere representation. So if it were shown that the charter-party was made for a purpose such that, unless the vessel began her voyage from the port of loading, with her cargo on board, by a certain time, it was manifest that the object of the charter-party would, in all probability, be frustrated, the Court might properly be led by this circumstance to conclude, that a statement as to the locality of the ship, coupled with a stipulation that she should sail with all convenient speed, was a warranty of her then locality. But we feel a difficulty in acceding to the suggestion which appears to have been, to some extent, sanctioned by high authority (see *Dimech v. Corlett*), that a statement of this kind in a charter-party, which may be regarded as a mere representation if the object of the charter-party be still practicable, may be construed as a warranty if that object turns out to be frustrated; because the instrument, it should seem, ought to be construed with reference to the intention of the parties at the time it was made, irrespective of the events which may

afterwards occur. It is true that in some of the cases, where the question has been whether a stipulation in a charter-party amounted to a condition, the Court decided that question in the negative, and in so doing took occasion to suggest that neglect or delay on the part of the shipowner to execute his part of the contract might be a breach of such an essential stipulation on his part as to justify the charterer in treating the contract as brought to an end thereby, and in refusing on that account to perform his part of it, and further suggested that, in deciding whether the breach on the shipowner's part was of such an essential stipulation as that described, the Court might advert to the fact whether such breach had frustrated the whole object which the charterer had in view (see *Freeman v. Taylor*, *Tarrabochia v. Hickie*, *Dimech v. Corlett*¹). But the Court did not, we apprehend, mean to intimate that the frustration of the voyage would convert a stipulation into a condition, if it were not originally intended to be one.

The question on the present charter-party is confined to the statement of a definite fact,—the place of the ship at the date of the contract. Now the place of the ship at the date of the contract, where the ship is in foreign parts, and is chartered to come to England, may be the only *dutum* on which the charterer can found his calculations of the time of the ship's arriving at the port of loading. A statement is more or less important in proportion as the object of the contract more or less depends upon it. For most charters, considering winds, markets, and dependent contracts, the time of a ship's arrival to load is an essential fact for the interest of the charterer. In the ordinary course of charters in general, it would be so: the evidence for the defendant shows it to be actually so in this case. Then, if the statement of the place of the ship is a substantive part of the contract, it seems to us that we ought to hold it to be a condition upon the principles above explained, unless we can find in the contract itself or the surrounding circumstances reason for thinking that the parties did not so intend. If it was a condition, and not performed, it follows that the obligation of the charterer dependent thereon ceased at his option, and considerations either of the damage to him or of proximity to performance on the part of the shipowner are irrelevant. So was the decision of *Glabohn v. Hays*, where the stipulation in a charter of a ship to load at Trieste was that she should sail from England on or before the 4th of February, and the non-performance of this condition released the charterer, notwithstanding the reasons alleged in order to justify the non-performance. So, in *Ollive v. Booker*, the statement in the charter of a ship which was to load at Marseilles was that she was "now at sea, having sailed three weeks ago," and it was held to be a condition for the reasons above stated. And we would note that the marginal abstract of this case states the stipulation to have been, "having sailed three weeks ago, or

¹ 12 Moo. P. C. C. 199, 224, 227.

thereabouts." If the statement had really been so indefinite, it may be that the Court would have come to a different conclusion.

We think these cases well decided, and that they govern the present case. We think that the decision of *Dimech v. Corlett* does not conflict with them; because it is immersed in the specific facts there set out, so as to be a precedent only for cases with very analogous specific facts. The statement in that charter, that the ship was "now at anchor in this port" (Malta), did not avail to release the charterer, because the ship was in the port in the dry dock; and, although the statement of the fact that she was at anchor in the port was definite, and indicated that she was ready for sea, while in truth she was in a dry dock being built, and was not completed for a month, yet, as the defendant was at Malta, and was presumed to have known the state of the ship, and also to have known of the delay, and did not insist that the charter-party was broken, but allowed the ship to sail from Malta for Alexandria without objection, his defence on this point failed.

The Court below in a manner referred the present case to a court of error, to say whether the decision should be governed by *Ollive v. Booker*, or *Dimech v. Corlett*. We are of opinion, for the reasons assigned, that the decision of *Ollive v. Booker* was sound, and that it governs our decision here; and we are further of opinion that, in so holding, we do not at all conflict with the decision in *Dimech v. Corlett*, as above explained.

On these grounds, we think that the judgment of the Queen's Bench should be reversed.

Judgment reversed.

TIDEY v. MOLLETT.

IN THE COMMON PLEAS, MAY 2, 1864.

[*Reported in 33 Law Journal Reports, Common Pleas, 235.*]

THE second count of the declaration stated that an agreement was made between the plaintiff and the defendant, which said agreement was so made A. D. 1863, within six lunar months before Midsummer of that year, and was contained in a certain letter and a paper therein enclosed, and the said letter, a letter written by the defendant, and by him addressed to the plaintiff, was in the words and figures following, that is to say: "13, Terrace, Camberwell. Sir, — Will you (meaning the plaintiff) be so good as to sign the enclosed, which contains in writing the agreement we (meaning the plaintiff and the defendant) made verbally, except that I have added the paragraph as to a lease at the end of three years. Return it to me, when signed, by post. Yours, John Mollett." And the said paper enclosed in the said letter

was in the words and figures following, that is to say: "1. Mr. Tidey engages to complete the whole work necessary by the 14th of June next. 2. The stairs in the kitchen to be made less steep. 3. The division of the bath from the other part of the room to be made when required by Mr. Mollett. 4. A greenhouse is to be erected of respectable appearance and size, and to be warmed by hot-air flue. 5. A door from the garden to the road is to be made. 6. Bells are to be hung throughout the house, and finger plates to be affixed to all the doors, as may be required by Mr. Mollett. 7. In case of any of the work proving defective, such as doors opening badly, cracking, &c., within six months, all is to be made good by Mr. Tidey. This arrangement applies also to the drainage. The water is to be laid on to the upper part of the house, and other deficiencies which may appear are to be made good by Mr. Tidey, and as may be decided by Mr. Colchester. In consideration of these conditions being fulfilled, Mr. Mollett engages to take the house, No. 51 Belsize Park, at the annual rent of 130*l.* per annum, to be paid quarterly. At the expiration of the three years Mr. Mollett is to have the option of continuing possession by taking a lease for seven, fourteen, or twenty-one years, on the terms of this agreement. Rent to begin from Midsummer next. London, 22d of May, 1863." And the plaintiff signed and returned to the defendant the said enclosed paper as requested by the said letter; and the plaintiff says that he has done every thing, and all things were done and happened necessary to entitle the plaintiff to have the defendant take the said house for three years at the said rent as agreed, yet the defendant did not nor would take the said house for three years at the said rent as agreed, but wholly refused so to do, whereby the plaintiff lost all the benefit of the said agreement and the said rent, and was prevented from letting the said house to other persons, and incurred great expenses in fitting up and preparing the said house for the defendant, and was otherwise injured and damaged.

Third count: For that the said agreement was made as and at the time in the second count mentioned; and the plaintiff says that all things were done and happened, and all times elapsed before the said breach, necessary to entitle the plaintiff to have the defendant take the said house for the said three years at the said rent as agreed, and to sue for the breach hereafter mentioned, except certain things which the defendant prevented the plaintiff from doing, yet the defendant did not nor would take the said house for three years at the said rent as agreed, whereby the plaintiff sustained similar damage to that in the second count mentioned.

Third plea to the second count: That the plaintiff did not fulfil the conditions on his part in the said agreement contained in this; that although required by the defendant so to do, the plaintiff did not complete the whole work necessary by the 14th of June, as in the said agreement provided.

Fourth plea to the third count: The defendant, to avoid repetition,

pleads the same facts which are pleaded to the second count; and he further says, that he did not prevent the plaintiff as in the third count alleged.

Demurrer to the third and fourth pleas, and joinder in demurrer.

Macnamara (*C. A. Turner* with him), in support of the demurrers. The pleas are bad. They do not show a non-performance of a condition precedent. The undertaking extends equally to all the provisions of the agreement; and it is quite clear that two of these provisions, one of which is to divide the bath from the other part of the room "when required," and the other, to make good deficiencies in the work "within six months," need not be carried out before the 14th of June; and this shows that the words in the agreement are not to be taken in their literal sense. The pleas do not show that the whole of the work was not done by the 24th, when the rent was to commence, or that the defendant gave notice to the plaintiff of the non-performance of a condition precedent. The agreement must be taken most strongly against the defendant. [BYLES, J. How do you understand the word "necessary"? The work could hardly answer the contract, unless it were all that was necessary.] If the conditions are to be fully and literally performed, the omitting to hang a single bell must defeat the plaintiff's right of action. The decisions which show when an engagement is to be construed as a condition precedent are to be found in the notes to *Pordage v. Cole*.¹ In *Lang v. Gale*,² where conditions of sale provided that an abstract of title should be delivered within three months of the date of the conditions, the Court said that this provision was not a condition precedent, but was meant only to secure a delivery within a reasonable time. And in *Lucas v. Godwin*,³ where a contract to build cottages contained these words, "Mr. L. agrees to pay 210*l.*, on condition of the work being done in a proper and workmanlike manner, and to be completed by the 10th of October, 1836, together with the amount of one-half of the foundations, as before mentioned," and the cottages were not completed till the 15th of October, it was held, that the value of the work might be recovered in an action for work and labor. [WILLES, J. In *Glaholm v. Hayes* these words in a charter-party, "The vessel to sail from England on or before the 4th of February next," were held to be a condition precedent. ERLE, C. J. Must not the case be decided by the intention of the parties, to be taken from their own words, coupled with the circumstances in which they stood at the time these words were used?] There are several cases where similar clauses in charter-parties have been held not to be conditions precedent. In *Ritchie v. Atkinson*, where the master agreed to load from the freighter's factors a complete cargo, and deliver the same on being paid freight, it was held that the delivery of a complete cargo was not essential in order to recover the freight. The late cases of *Behn v. Burness* and *Pust.v. Dowie* are to the same effect. Then the pleas should have

¹ 1 Wms. Saund. 320 b.

² 1 M. & S. 111.

³ 3 Bing. N. C. 737.

shown that the defendant elected to rescind the contract on the 14th, and that he did not allow the plaintiff to go on and incur expense. In *Carpenter v. Blandford*,¹ where 30*l.* had been deposited, to be forfeited in case the plaintiff did not perform his part of the agreement by a certain day, and the plaintiff, when that day arrived, gave notice that he should not be able to keep his engagement, but the defendant, without taking any notice of the default, allowed the plaintiff to proceed on the next day with the business which was the subject-matter of the agreement, it was held that the plaintiff might recover back the deposit. [WILLES, J. That is one of those numerous cases which show that a deposit may be recovered back, unless the agreement shows that this was not the intention of the parties.] The pleas, at any rate, should have shown that the repairs were necessary in order to make the house habitable, or that they were material and important repairs.

Bosanquet, for the defendant. The declaration is bad, as the instrument upon which it is founded is a lease, and therefore void, as not being under seal. With regard to the question as to whether the non-fulfilment of the condition is an answer to the action, in *Jones v. Berkeley* the rule is laid down that no person can call upon another to perform his part of the contract until he himself has performed all that he has stipulated to do as the consideration of the other's promises. The word "necessary" in the conditions must be taken to mean necessary in order to make the place fit for occupation. It could never be intended that the defendant should be compelled to move into a useless house, simply that he might recover damages. *Lucas v. Godwin* was not a case of tenancy. In *Maryon v. Carter*,² where the defendant covenanted to purchase one of a row of houses, and to pay a further sum of 80*l.*, provided the adjoining houses should be completed, *i. e.*, roofed, sashed, paved in front, inclosed with iron railings in front, and occupied by tenants for terms not less than yearly tenancies, by the 21st of April, 1829, and it was proved in an action to recover the 80*l.* that, by reason of bad weather, the foot-pavement had not all been laid down before the 25th of April, Tindal, C. J., nonsuited the plaintiff. It is submitted that the intention of the parties, as it appears on the face of the contract in question, shows that the consideration for the defendant's promise was a strict performance of the stipulation as to the repairs of the house, and that the case is therefore brought within the rule laid down in *Stavers v. Curling*. He also cited *Bac. Abr. tit. "Leases," Chitty on Contracts*, 6th ed. 644, and *Gore v. Lloyd*.³

ERLE, C. J. I am of opinion that our judgment should be for the defendant. I think that the writing upon which this case turns is an agreement and not a lease. The judges of this country were at one time not disposed to look upon writings such as this as agreements, but wishing to escape from the Statute of Frauds, they held them to be leases. Now, however, since the Statute 8 and 9 Vict. c. 106, making

¹ 8 B. & C. 575.

² 4 Car. & P. 295.

³ 12 Mee. & W. 463.

leases not under seal voidable, it has been the practice, for a very similar reason to that which existed before, to hold them to be agreements. With regard to the pleas, it appears that the defendant is sued for breach of his agreement in not becoming a tenant of a house belonging to the plaintiff on the 24th of June. The words of this agreement are "in consideration of these conditions being fulfilled, Mr. Mollett engages to take the house, No. 51 Belsize Park, for three years, at the annual rent of 130*l.* per annum." Now, these conditions are, that certain specified repairs are to be executed, and the whole work necessary is to be completed by the 14th of June. And the pleas say, that the plaintiff, although required, did not complete the whole work necessary by the 14th of June. I am of opinion that these pleas show the non-performance of a condition precedent. What passed between the contracting parties seems to be this: The plaintiff was the owner of a house in the course of construction, and the defendant took the house for three years from the 24th of June, stipulating that what was necessary should be made ready by the 14th of June. I think that the defendant was quite right in insisting upon the repairs being completed some days before that fixed for the commencement of his tenancy and his taking possession of the house. It is, therefore, very probable that the 14th of June was a material day, and we all think that, in the absence of any thing in the agreement or the surrounding circumstances to remove this presumption, we ought to give effect to it. It is said that the meaning of the word "necessary" is undefined. But whatever may be the improvements which come under the word "necessary," the pleas take up the word in the same sense as that in which it is used in the agreement and in the declaration, and the demurrers admit that the right meaning has been given to it.

WILLES, J. I am of the same opinion. It has been ingeniously argued that the completion of the repairs by the 24th of June would have been sufficient; but a very proper answer to that was given by the learned counsel for the defendant, namely, that the proviso for the completion of the work by the 14th of June might very well be inserted, in order to enable the defendant to establish himself within a reasonable time before the commencement of the tenancy. The proviso is made a condition precedent by the terms of the agreement, and I do not feel myself at liberty to say that the word "necessary" was not used in the sense contended for by the defendant.

BYLES, J. It ought now, I think, to be generally known from the cases of *Bond v. Rosling*¹ and *Parker v. Taswell*² that documents like the one declared upon, though void as leases, may, nevertheless, be available as agreements. The construction put upon this agreement by my brothers is, I think, the proper one.

KEATING, J., concurred.

Judgment for the defendant.

¹ 1 Best & Smith, 371.

² De Gex & J. 559.

CLARKE, *Assignee of the Estate and Effects of FRANCIS AYRES,
a Bankrupt*, AND OTHERS v. WATSON AND ANOTHER.

IN THE COMMON PLEAS, JANUARY 25, 1865.

[*Reported in 18 Common Bench Reports, New Series, 278.*]

THE first count of the declaration stated, that theretofore and before the said Francis Ayres became bankrupt, to wit, on the 9th of October, 1862, by an agreement in writing then made and entered into between the said Francis Ayres, William Mallows, and William Johnson, therein called "the contractors," of the one part, and the defendants of the other part, the said contractors agreed with the defendants to do certain works therein mentioned in conformity with certain plans, drawings, and sections therein mentioned; and also in conformity with certain specifications therein mentioned, as well as to the satisfaction and approval of the engineer to a certain board of health for the time, should such be found necessary, at or for 312*l.* 15*s.*, to be paid as follows: 156*l.* 7*s.* 6*d.* on production by the contractors to the defendants, or one of them, of the certificate of William Lambert, or other the surveyor for the time of the defendants, that they, the contractors, had duly and efficiently performed and completed such portion of the work as according to the judgment of the said surveyor should be not less than three-fourth parts thereof in extent and value; 78*l.* 3*s.* 9*d.* on the production by the said contractors to the defendants, or to one of them, of the certificate of the said surveyor as aforesaid, that the whole of the works mentioned and referred to in the said plans, drawings, and specifications, had been duly and efficiently performed and completely finished to his satisfaction, and also to the satisfaction of the said engineer for the time being of the local board of health, if necessary; and the balance of 78*l.* 3*s.* 9*d.* at the expiration of four months from the date of the said surveyor's certificate of completion; provided the therein-mentioned roads, pathways, drains, and culverts, and every part thereof, should be certified by the said surveyor to be in good repair and in perfect and sound condition in all respects; it being thereby intended and agreed that all the said works and materials should be so put and kept in good repair until the expiration of such four months from completion by and at the sole cost and expense of the said contractors; and the defendants thereby agreed with the said Francis Ayres, William Mallows, and William Johnson, in consideration of the due performance of the said agreements therein contained on their part, to pay to them the sum of 312*l.* 15*s.* at the times and in the manner thereinbefore mentioned. Averment: that although 156*l.* 7*s.* 6*d.*, part of the said sum of 312*l.* 15*s.*, had been paid, and all things necessary on the part of the said contractors to entitle them to have the certificate of the surveyor of the defendants, that the

whole of the works in the said plans, drawings, and specifications had been duly and efficiently performed and completed to his satisfaction, and also to the satisfaction of the engineer of the said local board of health, had been done and performed by them; yet the said surveyor had not given such certificate, but had wrongfully and improperly neglected and refused so to do, nor had the defendants paid the said sum of 78*l.* 3*s.* 9*d.* payable on such certificate; and that, although more than four months since the said surveyor ought to have given such certificate had elapsed, and although all things had been done by the said contractors on their part to entitle them to a certificate by the said surveyor that the said roads, pathways, drains, culverts, and every part thereof, were at the expiration of the said four months in good repair, and in perfect and sound condition in all respects, yet the said surveyor had not granted such certificate, but had wrongfully and improperly neglected and refused to do so, and the defendants had not yet paid the said balance of 78*l.* 3*s.* 9*d.*

The defendants demurred to this count, and the plaintiffs joined in demurrer.

Henry James, in support of the demurrer.¹ Two breaches are alleged in the declaration. The first is, that the defendants have not paid the 78*l.* 3*s.* 9*d.* The answer to that is, that, by the terms of the contract, it was payable only upon production of the surveyor's certificate, which has not been produced. The second breach is, that the surveyor has wrongfully and improperly withheld his certificate. No fraud, however, or collusion is charged. It is not even alleged that the conduct of the surveyor was fraudulent; the allegation that he wrongfully and improperly neglected and refused to grant his certificate would be satisfied by showing that he had been guilty of a mere error in judgment. *Scott v. The Corporation of Liverpool*, 1 Giffard, 216, is precisely in point. . . .²

Parry, Serjt., contra.³ Substantially, this is an action for a tort. The plaintiff complains of a wrong done by the agent of the defendants. Lambert was not acting for the plaintiffs, but for the defendants alone, to protect them against overcharges by the contractors. The contract in effect is that the defendants will employ Lambert, "or other their

¹ The points marked for argument on the part of the defendants were as follows: 1. That the first count discloses no cause of action against the defendants; 2. That the plaintiffs are not entitled to recover without obtaining the several certificates of the surveyor; 3. That the defendants are not liable for the surveyor not giving such certificates; and that in the absence of such certificates, no breach of the agreement is shown.

² The learned counsel here stated that case. — Ed.

³ The points marked for argument on the part of the plaintiffs were as follows: 1. That the surveyor is the agent of the defendants, and they are bound to employ him to certify according to the said agreement; 2. That the surveyor is responsible to the defendants for improperly certifying or omitting to certify; and they are responsible to the plaintiffs; 3. That the wrongful refusal of the defendant's agent to certify is a dispensation of the condition precedent, and equivalent to the defendant's preventing the certificate being granted.

surveyor for the time," to perform the duties of surveyor rightfully and honestly; and the defendants are responsible if the person so employed shall wrongfully or improperly withhold his certificate. [WILLES, J. The declaration states that the work was done to the satisfaction of the surveyor.] Yes. In *Pawley v. Turnbull*, 7 Jurist, n. s. 792, Vice-Chancellor Stuart held the conduct of the architect in withholding certificates to amount to improper conduct, and decreed payment of the money notwithstanding their absence. The defendants must be held to have dispensed with the condition of an engineer's or surveyor's certificate, if they appoint a man who wrongfully abstains from acting. [WILLES, J., referred to *Harrison v. The Great Northern Railway Company*, 11 C. B. 815, and *The Great Northern Railway Company v. Harrison*, 12 C. B. 576.] In *Milner v. Field*, 5 Exch. 829, there were negative words in the contract: the proviso was, that "no instalment should be paid unless the plaintiff delivered to the defendant a certificate signed by the surveyor of the defendant, that the works were performed according to the specifications." *Batterbury v. Vyse*, 2 Hurlst. & Colt. 42, is in reality an authority for the plaintiff, though the declaration alleged that the surveyor, in neglecting to certify, acted in collusion with the defendant and by his procurement. The point marked for argument on the part of the plaintiff there was, "that the defendant who employs the architect does contract with the plaintiff that he will do his duty and act fairly."

James was not called upon to reply.

ERLE, C. J. I am of opinion that the judgment in this case ought to be for the defendants. The contract which they entered into was, to pay to the contractors, the plaintiffs, certain sums on production by them to the defendants, or one of them, of the certificate of William Lambert, or other the surveyor for the time of the defendants. Many contracts are so made. Every man is the master of the contract he may choose to make; and it is of the highest importance that every contract should be construed according to the intention of the contracting parties. And it is important, in a case of this description, that the person for whom the work has been done should not be called upon to pay for it until some competent person shall have certified that the work has been properly done, according to the contract and specification. Here the contract is, that the money shall become payable on production by the plaintiffs to the defendants of the certificate of their (the defendants') surveyor, that the contractors have duly and efficiently performed and completed the work to his satisfaction. No such certificate has been produced. But it is said that the plaintiffs have done all things necessary to entitle them to have the certificate of the surveyor that the works had been duly performed and completed to his satisfaction, and that the said surveyor had "wrongfully and improperly" neglected and refused so to do. That, in my opinion, is not sufficient. If it had been alleged that the defendants wrongfully colluded with the surveyor to cause the certificate to be withheld,

they could not have sheltered themselves by their own wrongful act. But the word "wrongfully," as used here, does not intimate any thing of that sort. If the plaintiffs had intended to rely on the withholding of the certificate as a wrongful act on the part of the defendants, they should have stated how it was wrongful. This is in effect an attempt on the part of the plaintiffs to take from the defendants the protection of their surveyor, and to substitute for it the opinion of a jury. That is not the contract which the defendants have entered into. The allegations on the part of the plaintiffs are not in my judgment such as to entitle them to succeed.

WILLIAMS, J. I am of the same opinion. Notwithstanding the surveyor may have been wrong in withholding his certificate, the money is not due.

WILLES, J. I am of the same opinion. Consistently with the allegations in this declaration, the only wrong the surveyor has been guilty of may be an error in judgment, or he may have refused to exercise any judgment; in which case the proper course would have been to call upon the defendants to appoint some other surveyor who will do his duty.

KEATING, J., concurred.

Judgment for the defendants.

ROBERTS v. BRETT.

JULIUS ROBERTS, *Plaintiff in Error*. JOHN W. BRETT, *Defendant in Error*.

IN THE HOUSE OF LORDS, FEBRUARY 13, 14, MARCH 16, 1865.

[*Reported in 11 House of Lords Cases, 337.*]

THIS was an action for damages for breach of a contract under seal entered into on the 15th of May, 1855. The defendant represented "The Mediterranean Submarine Electric Telegraph Company," and on its behalf entered into a contract with the plaintiff to lay down 150 miles of cable between Cape Tabaque, on the northern coast of Africa, and Cape Spartivento, in the island of Sardinia.

The declaration stated that by a certain indenture, &c., entered into on the 15th of May, 1855, the plaintiff, for the considerations therein mentioned, covenanted with the defendant "that he, the plaintiff, should and would forthwith, at his own expense, procure the Cornwall frigate, or some other suitable vessel, and stow or cause to be stowed on board the said vessel the submarine telegraphic cable, which was one hundred and fifty miles in length, and was then at Morden Wharf, Greenwich, &c., and also should and would, at the like expense, fit out, &c., the said vessel, and provide competent officers and crew, and

place on board sufficient breaks and rollers, &c., and would, to the extent of 600*l.*, pay the expense of insuring the cable, and several other things; and should and would have the ship fully equipped in all respects and ready for sea at the Nore on or before the 15th of July then next." There were several other acts which the plaintiff undertook to do. And if he made default in having the ship with the cable on board fully equipped and ready for sea before the 15th of July then next, the defendant should be at liberty to retain from any moneys payable by him, as and for liquidated damages, 200*l.* per week, and at that rate for any less period than a week; but the power to enforce this payment by way of liquidated damages "should be without prejudice to the right of the defendant to exercise any other powers or remedies at law or in equity, by virtue of these presents, or the bond thereafter referred to, for enforcing the completion of the works before covenanted to be done, or for compensating himself for the damage occasioned by such default." And the defendant covenanted with the plaintiff that "he, subject to such rights of deduction, would pay the plaintiff 5,000*l.* by the instalments and at the times next mentioned, that is to say, the sum of 1,000*l.*, part thereof, on or before the expiration of seven days after the arrival of the vessel alongside Morden Wharf," the sum of 2,000*l.* twenty-one days after such arrival, and 2,000*l.* when the ship should put to sea from the Nore; and at the expiration of twenty-one days from the time when the cable should have been laid down, the defendant covenanted to deliver to the plaintiff five hundred paid-up shares in the company, of 10*l.* each. And then "it was agreed and declared that for the true performance of the covenants by the plaintiff thereinbefore contained, and for securing any penalties which he might incur under these presents, the plaintiff and two responsible sureties should, within ten days after the execution of these presents, give and execute to the defendant, his executors, &c., a bond in the penal sum of 5,000*l.* And for the due performance of the covenants on the part of the defendant thereinbefore contained, the defendant and two responsible sureties should, within ten days from the execution of these presents, give and execute to the plaintiff, his executors, &c., a bond in the penal sum of 5,000*l.*" And it was agreed and declared that the said bonds so to be given as aforesaid should not in any manner prejudice or affect the respective rights or liabilities of the plaintiff or the defendant.

The declaration then averred that the plaintiff did procure a vessel and fit it out, and was ready and willing to provide the officers and crew, and to perform all the acts covenanted to be performed, and to have the ship ready for sea at the Nore before the 15th of July; but before the time arrived for so doing, the defendant refused to perform the contract, and dispensed with the vessel being brought alongside the wharf; and the plaintiff alleged that he had performed all conditions stipulated on his part, and that every thing had taken place to entitle him to a performance by the defendant, of all which premises the de-

fendant had notice, and was requested to stow the cable on board, &c., and for doing all which matters and things a reasonable time had elapsed before the commencement of this suit, yet that the defendant did not nor would stow, or allow to be stowed, the cable, &c., but wholly refused, &c., and stowed the cable on board another ship or vessel, and thereby broke his contract. And the plaintiff further assigned for breach, that the defendant did not, within ten days, &c., execute the bond,¹ but therein made default.

The defendant pleaded first, except as to the giving of the bond (an exception repeated in each of the other pleas but the fifth), that the plaintiff did not procure a suitable ship, &c., and place the same alongside Morden Wharf as alleged. Secondly, that he did not fit out the ship as alleged. Thirdly, that the plaintiff was not ready and willing to provide and pay the officers and crew as alleged: and, Fourthly, that the plaintiff did not within ten days from the execution of the indenture (such ten days expiring before the plaintiff placed the ship alongside the Morden Wharf), or at any time give and execute, nor within the ten days procure two responsible sureties to give and execute, &c., a bond in the penal sum of 5000*l.* for the true performance by the plaintiff of the other covenants in the indenture contained, and according to the meaning and effect of such indenture. Fifthly, as to the breach of covenant by the defendant so excepted as aforesaid, the defendant paid into court the sum of one shilling.

The plaintiff took issue on the first, second, third, and fifth pleas.² On these pleas issue was joined. On these issues of fact, the cause was tried in June, 1858, at Guildhall, and a verdict for 2,300*l.* was found (on all the issues) for the plaintiff.

The plaintiff demurred to the fourth plea, and the defendant joined in demurrer. On this demurrer, judgment was given for the defendant (18 C. B. 561), which judgment was affirmed in the Exchequer Chamber. This proceeding in error was then brought.

Mr. *Bovill* and Mr. *Massy Dawson* (Mr. *Beasley* was with them), for the plaintiff in error. It must be assumed on these pleadings, that the plaintiff was able to perform the work undertaken by him in this contract, and that he did perform it as far as in him lay was a fact found by the jury. There is in the declaration an allegation of request to the defendant, and refusal by him to stow the cable. The declaration is therefore good. On the other hand, there is in the plea no allegation of request to the plaintiff, and refusal by him to give the bond. The plea is therefore bad. Besides, the covenants as to giving the bonds were mutual and dependent, and the defendant could not allege that the plaintiff did not give his bond without himself alleging that he was ready and willing to give his bond.

¹ This was a new breach, added after the first argument on the demurrer. See 6 C. B. n. s. 611, 618.

² The original pleadings were amended, see 6 C. B. n. s. 611, 618; they are here stated as they appeared when the case was brought up to this House.

The proper construction of the contract is the question now to be considered. The intention of the parties must decide it. What is the first stipulation in the contract? It is that the plaintiff shall "forthwith," at his own expense, procure the "Cornwall frigate," or some other suitable ship, and stow the cable on board. And the first stipulation by the defendant is that he will pay the plaintiff the sum of 1,000*l.*, part of the whole sum of 5,000*l.* "on or before the expiration of seven days after the arrival of the vessel alongside Morden Wharf," 2,000*l.* more on the expiration of twenty-one days after that time, and the remaining 2,000*l.* as soon as the ship had put to sea from the Nore. There is nothing which justifies the argument that the bonds were to be given before any one of these acts was performed, or that if the first of them had been performed, the 1,000*l.* would not have been payable, and that no action would have lain for its non-payment. Nor is there any thing which justifies the argument that the work, which was the object of the contract, was to be delayed till after the giving of the bonds.

The stipulation is, that the plaintiff shall "forthwith" bring the ship alongside Morden Wharf. He might have done so the next day; if he had, must it have lain there uselessly till the expiration of the ten days given for the delivery of the bonds? It is absurd to suppose that the parties had any such intention. If the ship had been brought there within twenty-four hours of the signing of the contract, that would have been a performance of the stipulation within the meaning of the word "forthwith," a word which certainly does not in any way imply delay, but quite the reverse. In the court below it was assumed that the plaintiff would not be liable to do what he undertook, and that the stipulation respecting the bond was to be a security against that, but the contract does not warrant that assumption, and there is no plea alleging that he was requested to bring the ship alongside and failed to do so.

If the plaintiff was under an obligation to give the bond before beginning to perform the work, so was the defendant. The covenants to give bonds are mutual, and dependent on each other. In that respect each party is in default, and cannot set up the default of the other in his own defence. But the absence of the bond cannot affect the working of the contract. If the obligation of the defendant to give his bond was not a condition precedent to any thing being done under the contract, how could the giving of a bond by the plaintiff deserve that character? It might be that non-performance of an act by one contractor would be an answer to an action by the other [*sic*], but that would not show that the act was a condition precedent; for example, in an action by the buyer of goods for non-delivery, the seller might aver that the plaintiff was not ready and willing to accept, and dispensed with the delivery of the goods, and proof of the plea might discharge the seller from his liability on the contract, but yet there would be no condition precedent in the case: *Pordage v. Cole*, and the

notes,¹ which show that where covenants are in form independent of each other, and the breach of any one of them may be compensated in damages, an action may be maintained for a breach of one without averring performance of the others. Suppose the plaintiff had laid down the cable, could it be said that he could not recover because no bond had been given. [LORD CHELMSFORD. He might, for work and labor.] It is clear that though the parties agreed to give bonds as further securities, they did not intend to prevent other modes of remedy. There is an express clause to that effect in the indenture. If there were ten things to be done, and nine were performed, it was not the meaning of the parties that the non-performance of one should invalidate the whole contract. *Stavers v. Curling* is in point. There A. undertook a whaling voyage, and covenanted to do certain things, on doing which the defendant covenanted to pay him a certain share of the profits. The Court held that these covenants were independent, and that the performance of them all was not a condition precedent to an action on the defendant's covenant. So in *Boone v. Eyre*, the principle was established that where a covenant goes only to part of the consideration on both sides, and the breach of it may be compensated in damages, it is an independent covenant and cannot be treated as a condition precedent. [LORD WENSLEYDALE. Does not the application of that principle depend on the form of the words used in the indenture?] Not necessarily so. [LORD CHELMSFORD. In *Stavers v. Curling*,² Lord Chief Justice Tindal says, "The question whether covenants are to be held dependent or independent of each other, is to be determined by the intention and meaning of the parties as it appears on the instrument, to which intention, when once discovered, all technical forms of expression must give way."] Even that test may be answered here in favor of the plaintiff, for the indenture nowhere shows that the whole business is to be stopped till the bonds are given; the fixing of a day for giving them is merely to prevent unnecessary delay in doing the work; but if part of the work had been done before the ten days elapsed, it would be contrary to the declared intention of the parties to prevent the plaintiff from having payment for it, by telling him that he ought previously to have gone through the formality of giving a bond.

In determining this question, regard must be had to the whole of the stipulations. The consideration here given by the plaintiff for the covenant of the defendant was not the execution of a bond, but the doing of the work. That was the principle acted on in *Davidson v. Gwynne*. In *Tarrabochia v. Hickie*, covenants that the vessel was tight, staunch, and strong, and should sail with convenient speed, were held not conditions precedent, unless their breach frustrated the object of the voyage. *Kingdom v. Cox*³ and *Clipsham v. Vertue*, *Campbell v. Jones* and *Mattock v. Kinglake*, established the same rule, even where there were fixed

¹ 1 Wms. Saund. 319 l. 320 d, note 3, citing *Boone v. Eyre*. See also the notes to *Cutter v. Powell*, 2 Sm. Lead. Cas. 13-15.

² 3 Bing. N. C. 355, 368.

³ 2 C. B. 661.

days for the performance of certain acts, the observance of those days not being held a condition precedent; and *Dicker v. Jackson*, as to the delivery of an abstract of title in an agreement for the sale of lands, proceeded on the same principle. The defendant here had dispensed with the plaintiff's performance of the contract, and thereupon the plaintiff was entitled to maintain his action: *Hochster v. De la Tour*,¹ where, after agreeing to pay a courier at and from a certain day, the defendant, before the arrival of that day, declined the plaintiff's services. So *Lovelock v. Franklyn*² decided that the defendant having incapacitated himself from assigning a lease to the plaintiff by having assigned it to another person, such act of the defendant was a good ground of action, and that it was not necessary for the plaintiff to aver a previous tender of the money, or a request, or plaintiff's readiness to accept the assignment. In *Cort v. The Ambergate Railway Company*, there was a contract for the manufacture and supply of goods, from time to time, to be paid for after delivery, where the defendant accepted and paid for a portion, and then gave a notice to the plaintiff not to make or send any more, as he, the defendant, would not accept or pay for them: the plaintiff was held entitled to maintain an action for breach of contract, without manufacturing or tendering the rest of the goods.

By the terms of the contract, the giving of the bonds is not to affect the rights and liabilities of the parties. [THE LORD CHANCELLOR. Did the defendant mean by that reservation, that if he suffered a greater amount of damage than 5,000*l.*, he should not be barred from recovering for it? If so, he would be reserving equitable rights. If one person did so, would it be reasonable to deprive the other of that benefit?] It would not. If one made default, the other being ready to perform the covenant, the latter could have sued the defaulter; when both made default, it had the effect of striking the covenant out of the indenture.

Two cases will be relied on by the other side. *Ellen v. Topp* is the first; that was an action against a father for non-performance of the articles of his son's apprenticeship. The plaintiff had abandoned one of the three trades which he had engaged to teach the son, and that was held an answer to the action. But that case is distinguishable, for there the Lord Chief Baron in judgment distinctly pointed out that the plaintiff himself had rendered it impossible for the defendant's son to do what was stipulated for in the articles of apprenticeship. The other case is *Graves v. Legg*. There the agreement was to ship *Donskoy* wool within certain times, and there was a provision that the names of the vessels were to be declared as soon as the wools were shipped. It was held that the provision was a condition precedent; but that was because of the established custom of the particular trade, which rendered the wool salable only on the declaration of the names of the vessels. These cases have no application to the present.

¹ 2 Ellis & B. 678.

² 8 Q. B. 371.

Mr. *Mellish* and Mr. *Horace Lloyd*, for the defendant in error. This is a mere question of construction, and everything depends on what was the intention of the parties. In the court below it was thought that their object was to secure the performance of the contract by making the giving of the bonds a condition precedent. The other construction would frustrate that object. [THE LORD CHANCELLOR. How is the payment of 1,000*l.* within seven days consistent with the giving of the bond being a condition precedent, when that bond was not to be given till ten days?] No such thing as a payment of that kind was contemplated. It was known to be impossible to prepare and bring alongside a vessel within so short a period of time. The seven days meant seven days after the bond was given and the work begun. It was not intended, if the plaintiff did not perform the work, and should happen to become bankrupt, that the defendant should have to prove against the bankrupt's estate the damages sustained by non-performance of the contract; and a mere action for non-performance of the condition as to giving the bond would be valueless, for the damages to be recovered therein would be merely nominal. It was therefore matter of necessity that the giving of the bonds should be a condition precedent; and such was the intention of the parties. Their object could not be secured but by making the giving of the bond a condition precedent.

"Forthwith" never had any other meaning in this contract but that of a reasonable time. But even if the vessel had been ready the next day, the plaintiff might have refused to bring it alongside till he got the defendant's bond, and the defendant might have refused to put the cable on board till he got the plaintiff's bond. [THE LORD CHANCELLOR. Then if the parties had neither obligations nor rights till the bonds were given, does not that show that the two acts are of necessity mutual obligations?] Giving one bond may or not be a condition precedent to giving the other bond; but it is a condition precedent to the performance of the other stipulations of the agreement. It appears to be so on the face of the indenture itself. The averments in the pleadings do not show that the plaintiff was ready to give the bond and that the defendant was not, but that both made default. Either party was at liberty to rescind the agreement. If both had gone on, the condition might have been waived; but that is not so with one alone. If one had duly performed the contract, he must, in an action upon it, have averred performance of all the conditions. Even under the Common Law Procedure Act that averment must be made. Here the averment was only that of readiness and willingness; no actual performance was shown, except by a general averment that the plaintiff had performed; nor was there any averment that there had been any dispensation with the duty of performing this condition of the contract. The pleas, therefore, rightly traversed the general allegation of the declaration, and specially alleged that the condition of giving the bond had not been performed.

The true construction of the covenant is, that neither party shall be called on to perform his part of the agreement until each has given his bond to perform it. It is for "the true performance of the covenants thereinbefore contained" that the bonds are to be given; and those covenants include the whole of the acts to be done under the contract.

Mr. *Massy Dawson* replied.

MARCH 16.

THE LORD CHANCELLOR (LORD WESTBURY). My Lords, the question on this appeal is, whether having regard to the true construction and intent of the agreement of 15th May, 1855, the stipulation that the appellant should, within ten days after the date and execution of the agreement, give a bond with sureties for the due performance of the covenants on his part, was a condition, the previous fulfilment of which, unless waived or released, was necessary to enable the appellant to maintain any action upon the agreement.

The case has been learnedly argued at the bar, and many decisions were cited, but the question depends on simple principles. First, having regard to the subject-matter of the agreement between the appellant and the respondent, the latter the representative of a company, it is reasonable to suppose that the company which was about to intrust the appellant with the laying down of a very valuable telegraphic cable, should require from the appellant security for the due fulfilment of his contract, and the requisition that the bond should be given within ten days is sufficient to show that it was intended to precede any material act under the agreement. The appellant indeed contends that if he had brought the "Cornwall frigate" or some other suitable vessel alongside Morden Wharf on the day of the date of the agreement, or the next day, the sum of 1,000*l.* would have been payable to him by the respondent within a week afterwards; and thus he insists that a material part of the contract might have been performed before the expiration of the ten days allowed for the bond, and that therefore the giving of the bond is not a condition precedent.

I cannot think that any such great expedition, if it had been possible, was contemplated by the parties, or that the appellant was bound to act with any such rapidity. His engagement is that he will forthwith, at his own expense, procure the "Cornwall frigate" or some other suitable ship or vessel for the purpose required; the word "forthwith" does not necessarily imply that this was to be done by the appellant before he had received the bond of the respondent and his sureties, that is, before the expiration of ten days. But if the appellant had brought a suitable vessel alongside the wharf so expeditiously as to have entitled himself to the sum of 1,000*l.*, and had received that sum (which must be the hypothesis) within the ten days and before the time for giving his bond expired, I should not have

thought that it affected his liability to give the bond within the appointed time.

It is urged that in the state of things supposed, the 1,000*l.* might not have been paid as stipulated, and so a breach of covenant by the respondent might have occurred within the ten days. If it did, I should still be of opinion that the appellant was bound to give or tender his bond to the respondent within the prescribed time. The right to have the security of two responsible sureties for the performance of the appellant's covenant, was a very material thing to the respondent's company, and of the essence of the contract; and I do not think it could be affected by any thing voluntarily done by the appellant within the ten days.

It was also contended by the appellant that the covenants to give the bonds by the appellant and respondent respectively were mutual covenants dependent one on the other; and that there was no default by the appellant until that instant of time at which there was a like default by the respondent, and that the respondent, being in like default, could not defend himself by pleading the default of the appellant.

But I fear that this is not the true meaning and effect of the contract. The engagements to give the bonds are not entered into in consideration one of the other; but the fulfilment of his own engagement by each of the parties is a necessary preliminary to his right to recover on the agreement. It is the true intent and object of the agreement that each party should find security within the time prescribed. If this be not done by either party both may be in effect released from the contract, which may fall to the ground; but neither party can recover for breach of the covenants in the agreement, unless he has performed this precedent obligation. I therefore move your lordships that the judgment of the Court below be affirmed.

LORD CRANWORTH. My Lords, I think that the judgment of the House ought to be for the defendant in error.

I agree with the opinions of the learned judges, that the giving of the bond must have been intended to be a condition precedent to any right of action for breach of any of the covenants contained in the indenture. On any other hypothesis the bond would be useless.

No doubt, as there was a covenant by each party with the other to give a bond with sureties within ten days, if default was made in giving a bond, a right of action would accrue for breach of that covenant, but such an action could produce no fruit to the party recovering in it. If brought before breach of any of the other covenants it could only result in nominal damages. If brought after a breach no damages could be recovered except such as would have been recoverable in an action founded on the breach itself. It would give no right against any sureties, the obtaining of which right was the sole object of the bond.

It was argued that the circumstance that the bonds were to be given not immediately, but within ten days, was inconsistent with the hypothesis of a condition precedent. A breach, it was suggested, might oc-

cur within the ten days, and so a right of action might accrue before any bond need have been given. This does not appear to me inconsistent with the hypothesis of a condition precedent. Probably the parties knew that, practically, no breach could occur within the ten days. But even if that is not so, the party injured by a breach of covenant within ten days might by giving his bond put himself in a condition to sue for the breach, for it would certainly be no answer on the part of the defendant sued for the breach to say that he had not given his bond.

Suppose, for instance, that the plaintiff had on the day of the date of the indenture moored a proper ship alongside Morden Wharf, but that after the expiration of seven days the defendant refused to pay him the 1,000*l*. The plaintiff, if he had given a proper bond with sureties to the defendant, would then have been in a condition to maintain an action of breach of covenant against the defendant, whether he had or had not given a proper bond to the plaintiff.

But it was argued that, even assuming the giving of the bonds to be conditions precedent, still they must be treated as mutual and dependent conditions, and that the defendant, who had given no bond to the plaintiff, could not insist on the want of such a bond from him. I do not feel the force of this argument. There is nothing in the indenture making it obligatory on either party to apply to the other for his bond. By giving the required bond, the party giving it puts himself in a condition of enforcing, if he thought fit, the performance of the covenants. If neither party, as was the case here, gave any bond, neither party could sue for any breach of covenant. This was the opinion of the courts below, and in that view of the case I concur.

LORD CHELMSFORD. My Lords, I agree with the decision of the Court of Exchequer Chamber affirming the judgment of the Court of Common Pleas.

The question is, whether the fourth plea is an answer to the action, or, in other words, whether the giving the bond by the plaintiff was a condition precedent to his right to recover damages from the defendant for his non-fulfilment of his part of the agreement.

The parts of the deed necessary to be noticed are these. [His lordship stated them, see *ante*, 575, 6.]

The learned counsel for the plaintiff argued that the covenant on the part of the plaintiff to give the bond could not be intended to be a condition precedent, because he was forthwith bound to procure the ship or vessel, so that he was to do an act before the ten days had expired within which the bond was to be given; and also that the defendant, having covenanted to pay the plaintiff 1,000*l*. on or before the expiration of seven days after the arrival of the ship or vessel at Morden Wharf, and the money being appointed to be paid on a day which might happen before the expiration of the ten days within which the bond was to be given, the giving of the bond could not be a condition precedent, according to the first rule upon the subject of dependent and independent covenants laid down in the notes to *Pordage v*

Cole. They also contended that the case fell within the third rule stated in these notes, as it was a covenant going only to part of the consideration, the breach of which might be paid for in damages. These rules are not proposed for the purpose of absolutely determining the dependence or independence of covenants in all cases, but merely as furnishing a guide to the discovery of the intention of the parties. For, as Lord Kenyon said in *Porter v. Shepherd*,¹ "conditions are to be construed to be either precedent or subsequent according to the fair intention of the parties to be collected from the instrument; and technical words (if there be any to encounter such intention) should give way to that intention."

Now what may fairly be considered to have been the intention of the parties upon the whole scope and object of the deed in question? Putting the agreement into a short form, it amounts to this: the defendant says to the plaintiff, in consideration of your doing certain acts, and giving me a bond with sureties to secure the performance of your covenant to do these acts, I will pay you a sum of 5,000*l.*, and give you a bond with sureties to secure the payment. And the plaintiff, on the other hand, covenants to do the acts and to give the bond in consideration of the performance by the defendant of the covenants on his part to be performed.

Upon this short summary of the deed there could scarcely be a doubt that either party might refuse to perform his part of the agreement until he was secured by the bond of the other.

But the counsel for the plaintiff say that the particular terms of the deed show that this could not be the intention. In particular, they lay great stress on the word "forthwith" in the plaintiff's covenant to procure the vessel, which they interpreted to mean "immediately;" and they urged this as a proof that the giving the bonds could not be meant to be conditions precedent, because this act of the plaintiff must necessarily have been done before the expiration of the ten days, to the last moment of which the defendant was at liberty to delay the execution of the bond. And they also insisted upon the clause for payment by the defendant of 1,000*l.* before the expiration of seven days after the arrival of the vessel at Morden Wharf, which might have happened within the ten days; and therefore they argued that the case, in both these respects, was within the first rule in the notes to *Pordage v. Cole*.

It appears to me that too great force was attributed to the word "forthwith" in the agreement, and that all that was meant by it was, that the plaintiff was, without delay or loss of time, to procure a suitable vessel for receiving the telegraphic cable. And to quicken his diligence the defendant covenanted to pay him 1,000*l.* within seven days after the arrival of the vessel at Morden Wharf. Out of regard to his own interest, too, the plaintiff would use all expedition in commencing the per-

¹ 6 T. R. 668.

formance of the agreement, because unless he had the vessel with the cable "on board equipped and ready for sea by the 15th of July," he would have been liable to pay 200*l.* per week for his default. I think that the plaintiff could not have been compelled to take a single step nor to incur the smallest expense towards procuring the vessel, till he was secured by having the defendant's bond, and that if he chose to proceed without having this security, every thing he did was at his own peril. If the defendant wished to obtain a right to urge the plaintiff's progress within the ten days, he might have executed and delivered his bond, and then he would have performed all that was required of him till the first instalment of the 5,000*l.* became due.

It is a strong circumstance indicative of the intention of the parties that the stipulations with respect to the mutual bonds should be conditions precedent, that these stipulations follow all the covenants entered into on both sides, and that they are agreed and declared to be given "for the true performance of the covenants hereinbefore contained." They are obviously intended, therefore, to be mutual securities for the performance of all the covenants by each of the parties respectively. This, I think, takes away all ground for saying that the covenants for giving the bonds go only to part of the consideration, and that a breach of them may be paid for in damages. Though strictly speaking they enter into and form part of the consideration on both sides, yet they extend to the whole of the covenants contained in the deed, and are an essential and vital part of the agreement between the parties. Nor is it easy to see how a breach of them could be compensated in damages, or what estimate could be formed of the measure of damages for their non-fulfilment.

I do not think that any thing in favor of the plaintiff can be made of the circumstance of the defendant not having given his bond. It appears to me that the mutual default of the parties had the effect of virtually putting an end to the agreement, because neither of them was in a situation to insist upon performance by the other.

A supposed case was put at the bar, of the plaintiff, after the ten days had expired without his bond having been given, going on to perform his covenants, and afterwards, in an action to recover the amount stipulated to be paid by the defendant, being met by a plea of the non-performance of the condition precedent. I have no difficulty in saying that in such a case the party who may avail himself of the non-performance of a condition precedent, but who allows the other side to go on and perform the subsequent stipulations, has waived his right to insist upon the unperformed condition precedent as an answer to the action.

Looking at the whole of the deed, I am satisfied that it was the intention of the parties that each should receive from the other a bond as a security for the performance of the covenants before either was bound to proceed to perform any of the stipulations contained in the deed. For these reasons, I think the judgment of the Exchequer Chamber ought to be affirmed.

Judgment affirmed.

RAYMOND v. MINTON.

IN THE EXCHEQUER, MAY 3, 1866.

[Reported in *Law Reports*, 1 *Exchequer*, 244.]

DECLARATION on a covenant by the defendant, contained in an indenture of apprenticeship of 18th Feb., 1864, by which the defendant covenanted to teach H. Page, the plaintiff's son-in-law, in the art, trade, or business of a builder, ornamental painter, and decorator, and to find him food, &c., during the five years of his apprenticeship, for a premium of 29*l.*, averring that the defendant did not nor would, during the term or the part of it already elapsed, teach the apprentice in the said art, &c., but wholly failed, neglected, and refused so to do; and did not nor would find him food, &c.

Third plea, as to the alleged breach in not teaching the apprentice, that at the time of the said alleged breach the apprentice would not be taught, and by his own wilful acts hindered and prevented the defendant teaching him in the said art, &c., and then, by his said acts, caused the breach pleaded to.

Demurrer and joinder.

Goddard, in support of the demurrer. The covenants in an apprenticeship deed are independent, and the non-performance of his duty by the apprentice may give a right of action to the master, but does not discharge him from the obligation to perform his own duty: *Winstone v. Linn*; on the contrary it is the master's duty to make the apprentice obey and learn, and he has the power by law to compel obedience: per *Watson, B.*, in *Phillips v. Clift*. The contract is one of a peculiarly personal kind, and of great mutual trust, and its difference from the ordinary one of master and servant is illustrated by the case last cited, where the dishonesty of the apprentice was held not to form any answer to an action against the master for not fulfilling his side of the contract. This plea may only mean that the apprentice is idle. [MARTIN, B., referred to *Mercer v. Whall*.¹] If it is contended that the apprentice's obedience is a condition precedent to the master's performance of his duty, independently of the covenants in the deed, the covenant in the deed for his obedience becomes superfluous.

Grantham, in support of the plea, cited *Hughes v. Humphreys*,² and pointed out that in both the cases relied on for the plaintiff, the action was brought for a total refusal to instruct the apprentice, which was not alleged here.

POLLOCK, C. B. It is evident that the master cannot be liable for not teaching the apprentice if the apprentice will not be taught, and the plea sufficiently shows that to be the case.

¹ 5 Q. B. 447.

² 6 B. & C. 680.

MARTIN, B. The master contracts to teach the apprentice by the best means in his power, and common sense points out that, if the apprentice will not be taught, the master cannot teach him by any means. The willingness of the apprentice to learn is naturally a condition precedent to the master's teaching him. Reduce the matter to a particular instance, and this becomes apparent. The master says to the apprentice, "get up on that ladder and I will teach you the business of a house decorator;" the apprentice refuses, and stands upon the floor; it is obvious that the cause of the apprentice not being taught is that he has made it impossible, and the master cannot be called upon to perform an impossibility.

BRAMWELL and PIGOTT, BB., concurred.

Judgment for the defendant.

BRADFORD AND ANOTHER v. WILLIAMS.

IN THE EXCHEQUER, MAY 4, 1872.

[*Reported in Law Reports, 7 Exchequer, 259.*]

DECLARATION that the plaintiffs and the defendant entered into a charter-party dated the 26th of May, 1871, in the terms following: "Bridgewater. It is this day mutually agreed between Captain Gower, of the ship *Ark*, now at Highbridge, and Messrs. Bradford & Sons (the plaintiffs), that the said ship, being tight, &c., shall, with all convenient speed, sail and proceed to a loading berth at Bullo, and there load from the factors of the affreighters a full and complete cargo of coals, . . . and, being so loaded, shall therewith proceed to Highbridge or Dunball, and deliver the same on being paid freight at the rate of 2s. 9d. per ton. . . . The freight to be paid, on unloading and right delivery of the cargo, in cash; to be loaded and discharged with all possible despatch; working days to be allowed the said merchants (if the ship is not sooner despatched) for loading the ship as above, and days on demurrage, at . . . l. per day. Vessel to load with Gollop & Co., or Gould & Co., till end of September, with captain's option; after September, at Gould & Co. . . . It is understood the vessel shall continue at this rate and term until end of March, 1872, and to discharge equally at Dunball and Highbridge;" that the defendant was then the owner of the *Ark*, and that subsequently she proceeded to Bullo and there loaded a cargo, and therewith proceeded to Highbridge and there delivered the same, and after the making of the charter-party, and until September, 1871, made divers successive voyages under it; that all conditions, &c., were fulfilled, yet the ship did not, during the period of time commencing with September, 1871, or at any time afterwards, continue to perform the things agreed upon, and the defendant,

although requested so to do, would not cause or permit the ship, after the commencement of September, or at any time other than the time between the date of the agreement and September, to proceed to the loading berth at Bullo and there load from the factors of the affreighters a full and complete cargo, whereby, &c.

4th plea: That after the commencement, and long before the end of September, and before breach, the vessel was at Bullo ready to load, according to the terms of the charter-party, and the captain exercised his option by electing to load from Gollop & Co., of all which premises the plaintiffs had notice, and although all things happened, &c., necessary to entitle the defendant to have the vessel loaded in the month of September by the plaintiffs from Gollop & Co., yet the plaintiffs were not ready and willing to cause the said vessel to be loaded in the said month or at any subsequent time from or with Gollop & Co., according to the terms of the agreement, but, on the contrary, absolutely refused so to do in violation of the terms of the charter-party, and gave notice to the defendant thereof; wherefore the defendant, as he lawfully might, refused further to perform the said charter-party, which are the alleged breaches.

Demurrer and joinder.

Lopes, Q. C. (*Poole* with him), in support of the demurrer, contended that the failure on the part of the plaintiffs to provide the defendant's captain with a cargo from Gollop & Co. in September, was matter for cross-action only, and did not so completely frustrate the object of the contract as to justify the defendant's refusal to continue to act under it.

[He cited *Boone v. Eyre*, *Campbell v. Jones*, *Ritchie v. Atkinson*, *Hoare v. Rennie*, *Withers v. Reynolds*, *Weaver v. Sessions*,¹ *Seeger v. Duthie*, *Tarrabochia v. Hickie*, *Jonassohn v. Young*, *Franklin v. Miller*, *Havelock v. Geddes*.]

Cole, Q. C. (*A. Charles* with him), contra, was not called on.

MARTIN, B. I think the plea is good. The rule with regard to what are or are not conditions precedent is well stated in the notes to *Pordage v. Cole*,² and also in *Abbott on Shipping*, 11th ed. p. 221, and in Chief Baron Pollock's judgment in *Hoare v. Rennie*. Contracts are so various in their terms that it is really impossible to argue from the letter of one to the letter of another. All we can do is to apply the spirit of the law to the facts of each particular case. Now I think the words "condition precedent" unfortunate. The real question, apart from all technical expressions, is, what in each instance is the substance of the contract. And it seems to me that here, under the circumstances alleged, and having reference to the nature of the charter-party, the defendant was entitled to declare the contract at an end. The contract was for the continuous employment of the ship, and the defendant, owing to the plaintiffs' refusal to perform what was, in my judgment, a material part of the bargain, was unable to go on, as he expected, earn-

¹ 6 Taunt. 154.

² 1 Notes to Wms. Saund. 548.

ing his freight. No cross-action for damages would have fully compensated him, and, that being so, he was justified in his refusal to work any longer under the charter-party. The cases of *Withers v. Reynolds*, and *Hoare v. Rennie*, which have been referred to, both seem to me to support the conclusion I have arrived at.

BRAMWELL, B. I am of the same opinion. The contract was for a continuous employment from May, 1871, to March, 1872. But in September, 1871, the plaintiffs in effect said, "We do not mean to go on loading you, the defendant, for a month;" whereupon the defendant said, "Then I shall not go on under the charter-party at all;" and I think he had a right to say so. Suppose the plaintiffs had said they would not load till some distant date—December, for example; but that afterwards they would again proceed with loading: what ought the defendant to do in such a case? He would clearly be bound to find some occupation for his ship; otherwise, when he brought his action for damages the plaintiffs would have good cause to complain. Then is he entitled only to do the best he can with his ship until the time named for loading by the plaintiffs, or is he not entitled to do the best he can once for all? In other words, is he not entitled to treat the charter-party at an end? In my opinion he may take the latter course and thus do what is best for himself, and, at the same time, mitigate as far as possible the damages which the plaintiffs would otherwise be liable to pay for their breach of contract.

Take another illustration: A ship is chartered out and home, say from London to New York, the charterer to load a cargo at both places. Then he declines to load in London; but still insists that the shipowner is to go to New York for the home cargo. Surely this would not be reasonable. Yet the case seems almost exactly analogous to the present. I think, therefore, the plea is good.

PIGOTT, B. I am of the same opinion. This was no mere partial breach by the plaintiffs, but one which, in my judgment, went to the root of the contract. If we look at the nature of the charter-party it is clear that the defendant expected to earn his freight under it week by week. Short voyages were to be made and paid for in cash. Then, in September, the plaintiffs take a course which certainly causes the defendant to lose his freight under the charter-party for a month, and it is said he should have brought a cross-action for damages. That, however, would not have completely compensated him for the loss of the regular and continuous employment he had contracted for under the charter-party. I think, therefore, he was justified in his refusal to work under it any longer.

Judgment for the defendant.

